Chapter 1

EGTRRA AND RECENT LAW PROVISIONS

By
Sam Hodges and Angelo Noe (Cincinnati)
Reviewers:
Robert Contreras (Dallas)

INTERNAL REVENUE SERVICE
TAX EXEMPT AND GOVERNMENT ENTITIES

Overview

Introduction

This chapter provides a comprehensive explanation of the changes to the qualification requirements under IRC section 401(a) made by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Public Law 107-16, and the technical corrections made to EGTRRA by the Job Creation and Worker Assistance Act of 2002 (JCWAA), Public Law 107-147. In addition, the chapter also discusses guidance (e.g., regulations) which has been issued by the Service related to various EGTRRA changes. Finally, the chapter discusses any other guidance changes (e.g., the final 401(a)(9) regulations) issued by the Service which have specifically been made subject to the EGTRRA remedial amendment period.

The specific sections of EGTRRA which provide for the changes to plans qualified under Internal Revenue Code (IRC) section 401(a) are sections 601 to 666. The general effective date for most of the EGTRRA changes is for years beginning after December 31, 2001. A major exception to this effective date applies to the EGTRRA changes to IRC section 415(b) applicable to defined benefit plans. The EGTRRA changes to IRC section 415(b) are generally effective for limitation years ending after December 31, 2001.

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Overview, Continued

Introduction (continued)

Although we are currently not ruling on EGTRRA for ongoing plans, it is something which must be considered for terminating plans. As a result, it is important for determination specialists to have a good understanding of the changes made by EGTRRA and any other guidance changes which have been made subject to the EGTRRA remedial amendment period. Without this knowledge, determination specialists will not know the proper amendments to secure for a terminating plan.

At the end of this chapter, you will find a copy of Notice 2001-57. This notice is the piece of guidance issued by the Service which provides sample EGTRRA amendments which are deemed to satisfy the good faith standard. Keep in mind, though, that as guidance (such as regulations, notices, etc.) is issued by the Service on the EGTRRA changes and a plan's termination date is in a plan year for which the guidance has become effective, the terminating plan's update for EGTRRA may not be as simple as adopting the sample EGTRRA good faith amendments of Notice 2001-57. Such a terminating plan's EGTRRA amendments may need to include some aspect(s) of the guidance, especially where it has used this aspect in plan operation.

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What is Good Faith?

Notice 2001-42

Notice 2001-42 states that in order for an adopting employee benefit plan to not be considered to have amended late for requirements of EGTRRA, the plan must adopt timely "good faith" EGTRRA amendments by the end of the GUST remedial amendment period.

The Components of "Good Faith"

This chapter breaks down the "good faith" requirement and describes what should and what should not be considered good faith.

Notice 2001-42 describes what a plan must do in order to be considered to have timely amended for the requirements of EGTRRA. Notice 2001-42 sets forth two basic requirements that plans must adhere to in order to be in compliance.

The first requirement is that of timeliness. The plan must amend for EGTRRA no later than the dates specified in the Notice, later extended through various Revenue Rulings and Procedures, and secondly, those amendments must be made in "good faith."

Timeliness

Good faith EGTRRA plan amendments must be adopted no later than the later of

1. the end of the plan year in which the amendments are required to be, or are optionally, put into effect or

2. the end of the GUST remedial amendment period. In limited situations, earlier amendment may be required to avoid a decrease or elimination of benefits prohibited by § 411(d)(6).

As we all know, the GUST remedial amendment period has been subsequently extended and then re-extended, but generally, the end of the GUST remedial amendment period is also the end of the EGTRRA amendment period.

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What is Good Faith?, Continued

Timeliness (continued)

Plan provisions that are amended by a timely good faith EGTRRA plan amendment or that automatically reflect a statutory EGTRRA change (for example, as a result of permitted incorporation by reference) will have a remedial amendment period ending no earlier than the end of the 2005 plan year in which any needed retroactive remedial EGTRRA plan amendments may be adopted.

Furthermore, a plan is required to have a good faith EGTRRA plan amendment in effect for a year if:

1. the plan is required to implement a provision of EGTRRA for the year, or the plan sponsor chooses to implement an optional provision of EGTRRA for the year, **and**
2. the plan language, prior to the amendment, is not consistent either with the provision of EGTRRA or with the operation of the plan in a manner consistent with EGTRRA, as applicable.

Good Faith

Just because an amendment has been adopted timely does not mean that that amendment is sufficient to conform the plan to the requirements of Notice 2001-42. In order for an amendment to be a proper EGTRRA amendment for purposes of Notice 2001-42 the amendment be made in "good faith." Notice 2001-42 goes on to state what will be considered "good faith."

The Internal Revenue Service published sample EGTRRA plan amendments in Notice 2001-57 that plan sponsors and sponsors of pre-approved plans could adopt or use in drafting individualized plan amendments. A sample EGTRRA plan amendment, or a plan amendment that is materially similar to a sample EGTRRA plan amendment, will be a "good faith" EGTRRA plan amendment.

For purposes of Notice 2001-42, a plan amendment is a "good faith" EGTRRA plan amendment **if the amendment represents a reasonable effort to take into account all of the requirements of the applicable EGTRRA provision and does not reflect an unreasonable or inconsistent interpretation of the provision**. **A plan amendment that merely incorporates by reference an EGTRRA change in a qualification requirement that would not otherwise be permitted to be incorporated by reference is not a "good faith" EGTRRA plan amendment**.

The Good Faith requirements will be discussed in greater detail later on in this chapter.

The 7061 Paragraph

7061

The caveat added to all determination letters issued where the submitting employer has submitted good faith amendments intended to satisfy the requirements of EGTRRA is represented by the EDS paragraph number 7061. This paragraph reads, "(t)his determination letter acknowledges receipt of the provisions intended to satisfy the requirements of IRC § 401(a), as amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L 107-16."

This paragraph on the determination letter will grant the sponsoring employer the right to make corrective amendments in the future provided that good faith amendments were submitted to the Internal Revenue Service for consideration prior to the determination letter's issuance. This paragraph must be read in conjunction with the stock paragraph currently being added to all determination letters issued. That paragraph reads, "(t)his letter may not be relied on with respect to whether the plan satisfies the requirements of IRC § 401(a), as amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L 107-16."

When taken in conjunction, paragraph 7061 grants only reliance for having met the good faith standard. The two paragraphs expressly reserve ruling on the content of the EGTRRA amendments and deny determination letter coverage to those amendments.

Job Creation and Worker Assistance Act of 2002

Introduction

– Pub. L. No 107-147 (Mar 9, 2002) contains technical corrections to EGTRRA

The Job Creation and Worker Assistance Act of 2002

When first enacted into law, EGTRRA contained several defects that were sufficient enough to warrant technical corrections to the act.

The bill that introduced the Job Creation and Workers Assistance Act of 2002 (JCWAA) into Congress was introduced to the United States Congress, House of Representatives by Resolution on October 11, 2001. This Bill was considered and passed by the House of Representatives on October 24, 2001, passed by the Senate, February 14, 2002 and enacted into law as P.L. 107-147 March 9, 2002.

What JCWAA Changed

The enactment of JCWAA changed several provisions of EGTRRA. Among the affected provisions were:

a) modification of top-heavy rules to reflect the "separation from employment" language; increasing the employee's annual exclusion limit under IRC § 402(h) for SEP contributions from 15% to 25% of compensation,

b) clarifying that IRC § 404(a)(7) does not apply if the DC plan contains only elective contributions,

c) clarifying that the tax credit for elective deferrals (and IRAs) is reduced by after-tax distributions,

d) modifying the effective date for the credit for pension plan startup costs of small employers from established date to plan's effective date,

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Job Creation and Worker Assistance Act of 2002, Continued

What JCWAA Changed (continued)

e) catch-up contributions for individuals age 50 or over are determined on an aggregate basis, age is determined on the basis of the plan year, and the transition period applies to universal eligibility,

f) rollovers of after-tax contributions must be made only to DC plans or IRA's,

g) the spousal consent requirements are modified to conform to the cash out rules regarding rollovers and the $5,000 threshold,

h) for deemed IRAs, the term "qualified employer plan" includes the following governmental plans, 401(a), 403(a), 403(b) and 457(b); and DOL rules apply to IRAs in a manner similar to SEPs.

DB Plan Provisions

The JCWAA Provides relief from IRC § 411(d)(6) restriction on decreases in accrued benefits for plans that incorporate by reference the increased 415(b) dollar limit ($160,000 in 2002) by 6/30/2002.

If very specific requirements are satisfied, a qualified DB will not violate the anti-cutback rules of IRC § 411(d)(6) if it is amended to reduce the amount of benefits that it would otherwise be required to pay.

If the requirements are satisfied, a DB may be amended to reduce benefits to the level that would have applied without regard to the increase in benefits mandated by EGTRRA. Without this provision, fiscal-year plans would generally be required to pay increased retirement benefits before the year that Congress intended the EGTRRA increase to take effect.

In order to qualify, the plan must:

a) have incorporated by reference the dollar limit imposed by IRC § 415(b)(1)(A) by June 7, 2001, AND
b) the plan must have adopted a plan amendment reducing the benefits that would otherwise be payable on or before 6/30/02, AND
c) the plan must reduce benefits to the level that existed prior to the increase otherwise required by EGTRRA by the plan amendment, AND
d) the plan amendment is not effective earlier than plan years ending after 12/31/01.

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Job Creation and Worker Assistance Act of 2002, Continued

DB Plan Provisions- written notice requirements

According to the JCWAA, if an applicable pension plan is amended to provide for a significant reduction in the rate of future benefit accrual, including any elimination or reduction of an early retirement benefit or retirement-type subsidy, the written notice that shall be provided by the plan administrator to each applicable individual (and to each employee organization representing applicable individuals) shall be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as defined in treasury regulations) to allow applicable individuals to understand the effect of the plan amendment.

The notice requirement applies to a DB plan only if the plan is qualified and, in the case of an amendment that eliminates an early retirement benefit or retirement-type subsidy, notice is required only if the early retirement benefit or retirement-type subsidy is significant. These provisions generally apply to plan amendments taking effect on or after 6/7/01.

DB plan provisions- section 412

JCWAA further modified the provisions of IRC § 412(c)(9)(B) governing the use of prior year valuation dates. The 125% threshold required to value DB assets using a prior plan year valuation date is decreased to 100%. The value of the plan assets cannot be less than 100% of the plan's current liability on the prior plan year valuation date. IRC § 412(c)(9)(B)(ii). The 100% threshold is increased to 125% in the case of a change in funding method that is made to take advantage of prior plan year valuation. IRC § 412(c)(9)(B)(iv).

Rules under IRC §§ 412(l)(7) and 412(m) relating to the interest rates used in the determination of current liability for minimum funding rules due to the discontinuation of the 30-year bond were also amended by JCWAA. A temporary increase in the maximum interest rate to be used in determining current liability from 105% to 120% of the weighted average interest rate of 30-year Treasury securities for plan years beginning after 12/31/02 and before 1/1/2004 was enacted by JCWAA.

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Job Creation and Worker Assistance Act of 2002, Continued

DB Plan Provisions- written notice requirements (continued)

For plan years beginning in 2002 or 2003, the permissible range of interest rates that may be used in determining the current liability component of the full funding limitation must be a rate that is not less than 90% or greater than 120% of the weighted average interest rate during the 4-year period prior to the beginning of the plan year.

Redetermination of current liability in 2002 and 2004 will offset quarterly contribution. Specifically, for plan years beginning in 2002, current liability for the 2001 preceding plan year will be "redetermined" using 120% as the maximum interest rate. The window during which current liability may be redetermined under the higher interest rate authorized for only a limited period.

Catch-up Contributions

The aggregation of plans for purposes of the limits on catch-up contributions under IRC § 414(v) has also been modified by JCWAA. The applicable dollar catch-up limit varies depending on the type of plan in which the eligible individual participates. The catch-up limit applies to:

- all qualified plans,
- IRC § 403(b) plan,
- SEPs, and SIMPLE plans

maintained by the same employer on an aggregate basis, as if all of the plans were a single plan.

The catch-up limit will also be applied to all IRC § 457 plans maintained by the same governmental employer on an aggregated basis.

Participants in governmental 457 plans who have attained age 50 are eligible to make catch-up contributions under IRC § 414(v) if those contributions would exceed the catch–up contribution authorized during their last three years of employment under IRC §457(b)(3).

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Job Creation and Worker Assistance Act of 2002, Continued

Waiver of aggregation requirement

The universal availability requirement now allows a waiver of the aggregation requirement for a limited period following certain dispositions or acquisitions. Specifically, plans that are incident to a merger or acquisition, qualify for relief under the IRC § 410(b)(6)(C)(i) transition period for coverage testing.

These plans need not be aggregated with other plans until the expiration of the transition period that,

i. begins on the date of the change in members of a group, and

ii. ends on the last day of the first plan year beginning after the date of such change.

Deduction Limit

The deduction limit provides that the 25% deduction limit that generally applies when an employer maintains both a defined benefit plan and defined contribution plan will not be imposed **if** the only contributions made to the defined contribution plan during the tax year are elective deferrals.

After-Tax Contributions

After-tax contributions may only be rolled over to a qualified defined contribution plan that agrees to **separately account** for the transferred amounts or an IRA.

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Job Creation and Worker Assistance Act of 2002, Continued

Rollover of Distributions

EGTRAA provided authorization of the rollover of distributions of after-tax contributions. This provision raised the question of whether participants were empowered to designate rollovers as deriving from pre-tax or after-tax amounts.

JCWAA resolved the issue by providing that a rollover to a qualified DC plan or an IRA that include pre-tax amounts and after-tax contributions will be characterized as deriving first from pre-tax amounts (IRC § 402(c)(2)).

NOTE – the new ordering rules **only apply** when a portion of a participant's interest is not rolled over to a new plan. The ordering rules would not require a distribution of a participant's entire account which is rolled over in its entirety to a single new plan to be allocated between pre-tax and after-tax amounts.

Severance from Employment

Distributions made upon "severance from employment" will be considered for only one-year in determining a plan's top-heavy status. JCWAA amends IRC § 416(g)(3)(B) to provide that distributions made following an employee's "severance from employment" will be taken into account in the top-heavy determination for only one-year after distribution.

J&S requirements

For plans that are subject to joint and survivor requirements, QJSA or QPSAs may also exclude a participant's rollover contributions (and earnings thereon) from the present value of the participant's benefit for purposes of determining whether the participant of the participant's spouse must consent to cash-out of the benefit. EGTRRA changed the cash-out rules to exclude roll-over amounts from the calculation of present value for purposes of determining whether or not the present value exceeded $5,000. JCWAA clarified that this also applies to QJSA and QPSA.

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Job Creation and Worker Assistance Act of 2002, Continued

SEP

SEP deduction limit corrected by increasing the employer's contribution to 25% of compensation rather than limiting an employer's contribution to 15% This corrects a drafting oversight in EGTRRA.

The formula used to determine the maximum contribution to an employee's SEP now provides that the allowable contribution is the lesser of 25% of the employee's compensation ($200K maximum compensation may be considered) or $40K (for 2002). This increase in the percentage used to compute the contribution limit from 15% to 25% brings it into conformance with the percentage used to compute the deduction limit for SEP contributions.

JCWAA clarifies SEP compensation in that deductions for elective deferrals (e.g. 401(k) contributions) are not subject to any limit imposed on deductions to SEP plans, as well as stock bonus and profit sharing plans, combinations of DBs and DCs, and ESOPs. Compensation does include "elective deferrals."

The result of the changes made to the definition of "compensation" by EGTRRA and JCWAA is that a more uniform definition may be applied when applying the contribution and deduction rules. By including the elective contributions in compensation when computing the allowable deduction to SEPs and other types of qualified plans, the deduction may be increased.

Under JCWAA, the minimum amount of compensation used to determine participation in the SEP has been increased from $300 to $450 which was needed to bring the amount used for inflation into compliance with the new base period used for future cost-of-living adjustments.

Compensation

The term "includible compensation" under JCWAA now has the same meaning given to the term "participant's compensation" as provided in IRC § 415(c)(3). For this purpose, participant's compensation means the compensation for the participant from the employer for the plan year.

Church plan

JCWAA restores special rules for ministers and lay employees of churches and for foreign missionaries. In determining years of service with related church organizations, all yeas of service are treated as years of service with a single employer. Additionally, the definition of the terms "church" and "convention or association of churches" have been conformed to the same meaning as under IRC § 414(e).

IRC § 414(v) Catch-Up Contributions for Individuals Age 50 or Over

Introduction

- IRC § 414(v) added by EGTRRA
- Statutory effective date is taxable years beginning on or after January 1, 2002
- Final regulations under IRC § 414(v) published on July 8, 2003 and effective for contributions in taxable years beginning on or after January 1, 2004
- Technical corrections to IRC § 414(v) by JCWAA effective for years beginning after December 31, 2001 including the adding of IRC § 402(g)(1)(C)
- Amendment is optional

Explanation of provision-general rule

Under IRC § 414(v), an individual age 50 or over is permitted to make catch-up contributions (up to a dollar limit provided in IRC § 414(v)(2)) under an applicable employer plan if certain requirements are satisfied.

IRC § 414(v) also provides that a plan will generally not violate any provision of the IRC by permitting these catch-up contributions to be made. In other words, except with respect to the universal availability requirement of IRC § 414(v)(4) and Treas. Reg. § 1.414(v)-1(e), the applicable employer plan shall not be treated as failing to meet the requirements of IRC §§ 401(a)(4), 401(k)(3), 401(k)(11), 403(b)(12), 408(k), 410(b), or 416, by reason of the making of (or right to make) such contribution.

In addition, such a contribution with respect to the year it is made will not be subject to any otherwise applicable limitation contained in IRC §§ 401(a)(30), 402(h), 403(b), 408, 415(c), and 457(b)(2) (determined without regard to IRC § 457(b)(3)), or be taken into account in applying such limitations to other contributions or benefits under the plan or any other plan of the employer.

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IRC § 414(v) Catch-Up Contributions for Individuals Age 50 or Over, Continued

Eligible participant for purposes of IRC § 414(v)

A participant in a plan is eligible to make catch-up contributions if the participant is otherwise eligible to make elective deferrals under the plan and would attain age 50 or older before the end of the participant's taxable year. In the case of a non-calendar year plan, a participant is treated as a catch-up eligible participant beginning on January 1 of the calendar year that contains the participant's 50th birthday, without regard to the plan year. For example, if a 401(k) plan has a fiscal plan year ending June 30, 2003, any participant attaining age 50 on or before the end of calendar year 2003 would be eligible to make catch-up contributions under such plan as of the January 1 occurring within such June 30, 2003 fiscal plan year end.

Employer plans that can permit catch-up contributions

An IRC § 401(k) plan

A SIMPLE IRA plan

A simplified employee pension (SEP) plan

An IRC § 403(b) plan

An IRC § 457 plan maintained by an eligible governmental employer described in IRC § 457(e)(1)(A)

"Employer" and "employee" defined

The terms "employer" and "employee" as used under IRC § 414(v) have the same meaning as that provided under Treas. Reg. § 1.410(b)-9.

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IRC § 414(v) Catch-Up Contributions for Individuals Age 50 or Over, Continued

Catch-up contributions defined

Catch-up contributions are elective deferrals (as defined under IRC § 414(u)(2)(C)) made by an eligible participant which exceed an "otherwise applicable limit." There are three (3) types of "otherwise applicable limits":

a statutory limit,

an employer provided limit, and

the ADP test limit.

An elective deferral need only exceed one of these three limits to be considered a catch-up contribution.

A statutory limit is a limit imposed on elective deferrals by the IRC, without regard to IRC § 414(v). Examples of a statutory limit are IRC §§ 401(a)(30) and 415.

An employer provided limit is a limit imposed on elective deferrals under the terms of the plan document, without regard to IRC § 414(v), but which is not a statutory limit or an ADP test limit. An example of a plan imposed limit would be where the plan document limits elective deferrals made by plan participants for the plan year to 15% of compensation.

The ADP test limit is the limit imposed on elective deferrals made by HCEs, without regard to IRC § 414(v), in order to pass the ADP test of IRC § 401(k)(3). This limit affects only HCEs and comes into play only where the plan is making corrective distribution of excess contributions pursuant to IRC § 401(k)(8). If an employer chose to make a qualified non-elective contribution (QNEC) for a plan year in order to pass the ADP test, the ADP test limit would not be a consideration in determining if an HCE participant had any catch-up contributions for such plan year. In addition, since a safe harbor 401(k) plan under IRC § 401(k)(12) and a SIMPLE 401(k) plan under IRC § 401(k)(11) are not subject to the ADP test, again the ADP test limit will not come into play in determining whether an eligible participant who is an HCE in such a plan had any catch-up contributions.

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IRC § 414(v) Catch-Up Contributions for Individuals Age 50 or Over, Continued

Regulatory ordering rule for determining catch-up contributions Treas. Reg. 1.414(v)-1(c)(3)

Due to the possibility of an IRC § 401(k) plan having an eligible participant(s) make elective deferrals in excess of all three (3) otherwise applicable limits, the final regulations under IRC § 414(v) provide an ordering rule (officially called a timing rule in the final regulations) in applying the limits to determine catch-up contributions.

- First, any statutory limit tested on the basis of the taxable year or calendar year (e.g., IRC § 401(a)(30)) as opposed to the plan year is applied first. This is because such a limit is tested as deferrals are made and is not dependent upon the end of the plan year being reached. Next, any employer provided limit is applied.

- Next, the IRC § 415 limit is applied (An exception to the ordering rule for the employer provided limit and the IRC § 415 limit exists though where the limitation year is not the same as the plan year. In this case, the IRC § 415 limit is applied before the employer provided limit).

- Finally, the ADP test limit is applied last. Please note that as each step of the ordering rule is applied, those amounts treated as catch-up contributions in a step are disregarded in determining if an eligible participant has catch-up contributions through application of a subsequent step. Of course, each step's catch-up contributions are aggregated in determining if the applicable dollar catch-up limit has been exceeded.

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IRC § 414(v) Catch-Up Contributions for Individuals Age 50 or Over, Continued

Example of ordering rule

Here is an example of the ordering rule. Employer X maintains a 401(k) plan which has a calendar year plan year. Participant A is a participant in such plan who is 52 years old and is a HCE. Under the terms of the plan, Employer X does not limit salary deferrals made by plan participants to any amount other than that required by IRC § 402(g), IRC § 415, and the ADP test. The terms of the plan document permit catch-up eligible participants to make catch-up contributions up to the applicable dollar catch-up limit. Let us suppose we are looking at the 2003 plan year.

For 2003, Participant A had compensation of $200,000 with salary deferrals of $15,000. Since the IRC § 402(g)(1)(A) limit for the 2003 tax year was $12,000, Participant A had excess deferrals of $3,000. Since the applicable dollar catch-up limit for 2003 was $2,000, the plan treated $2,000 of the $3,000 in excess deferrals as a catch-up contribution for Participant A. In accordance with IRC § 402(g)(1)(C), the remaining $1,000 was considered an excess deferral and was distributed by the plan to Participant A by April 15, 2004. Since the applicable dollar catch-up limit for 2003 was reached for Participant A, the plan could not go any further in determining catch-up contributions for Participant A.

Example 2, illustrating steps to use up catch-up contributions

Now let's suppose in the prior example that Participant A has salary deferrals of $13,000 for 2003. Here Participant A's salary deferrals exceed the IRC § 402(g)(1)(A) limit by only $1,000. Thus, the plan can treat this $1,000 as a catch-up contribution for Participant A. Since the applicable dollar catch-up limit has not been used up for Participant A, the plan can apply all of the other steps (i.e., apply all of the other "otherwise applicable limits") in the ordering rule to determine if Participant A has any further catch-up contributions under the plan for the 2003 tax year. Because the plan does not contain an employer provided limit, this step in the ordering rule can be ignored.

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IRC § 414(v) Catch-Up Contributions for Individuals Age 50 or Over, Continued

Example of ordering rule (continued)

The plan then checks Participant A's annual additions against the IRC § 415 limits and finds no excess annual additions. Since Participant A is an HCE, the running of the ADP test for the plan year is one last means (step) in the ordering rule for Participant A to have any additional catch-up contributions. Remember, the ADP test can only be used as a means for creating catch-up contributions if the employer is distributing excess contributions calculated from running such test to correct the test. Assume after running the ADP test for 2003, the employer determines each HCE's deferrals can't exceed $10,500. This means Participant A has excess contributions under the ADP test of $1,500 ($12,000-$10,500). Remember, Participant A's previously determined catch-up contribution of $1,000 is disregarded in calculating his actual deferral ratio (ADR) for the ADP test. Since $1,000 of Participant A's applicable dollar catch-up limit remains, the plan **must** treat $1,000 of the $1,500 as a catch-up contribution and need only distribute $500 to Participant A to correct the ADP test. Please note the word "must" has been highlighted in the prior sentence. This is because the IRC § 414(v) regulations require the potentially distributable ADP excess contribution to be retained in the plan as a catch-up contribution for Participant A up to the remaining applicable dollar catch-up limit as opposed to distributing it. If the plan were not required to retain it, the plan would fail to give Participant A an effective opportunity to make the same dollar amount of catch-up contributions as all other catch-up eligible participants.

Effective opportunity is a condition of the universal availability requirement which will be discussed later. Please note under Treas. Reg. § 1.414(v)-1(d)(2)(iii), the plan is treated as satisfying the ADP test even though the $1,000 is not distributed but instead retained in the plan as a catch-up contribution for Participant A.

Under this example, the plan is now finished determining catch-up contributions under the plan for Participant A for 2003 because it has applied all steps in the ordering rule to such participant. Due to the catch-up rules, Participant A has been able to retain in the plan salary deferrals of $12,500, whereas prior to the enactment of the catch-up rules he would have been able to retain in the plan only $10,500.

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IRC § 414(v) Catch-Up Contributions for Individuals Age 50 or Over, Continued

Practitioners Note

Even though this is largely an operational issue, determination specialist should look for language that allows for the forfeiture of these catch-up deferrals.

Even though the excess is not distributed due to being reclassified as catch up contributions, any matching contributions made with respect to these deferrals are permitted to be forfeited under IRC § 411(a)(3)(G). The important thing to note here is the fact that if the employer wants to forfeit these deferrals, the plan document must so state. Treas. Reg. § 1.414(v)-1(d)(2)(iii). The agent should look for this provision however, since this is mainly an operational issue the agent reviewing the plans will probably not know, without further investigation, whether these matching contributions were forfeited.

Limit on catch-up contributions

Under IRC §§ 414(v)(2) and 402(g)(1)(C) , a limit is placed on the amount of catch-up contributions a catch-up eligible participant can make for each tax year. This limit is the lesser of :

1. the applicable dollar amount for each tax year set forth in the table appearing in IRC § 414(v)(2)(B), or

2. (2) the excess (if any) of the participant's IRC § 415(c)(3) compensation over the amount of elective deferrals made by the participant for the tax year without regard to IRC § 414(v).

Thus, the catch-up rules do not permit a participant to make catch-up contributions in excess of the compensation which they have received for such tax year.

Please note there are two tables set forth under IRC § 414(v)(2)(B). One table sets forth the dollar limit for an applicable employer plan that is a SIMPLE 401(k) plan or SIMPLE IRA, and the other table sets forth the dollar limit for all other applicable employer plans. The tables are set forth below.

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IRC § 414(v) Catch-Up Contributions for Individuals Age 50 or Over, Continued

Tables

Applicable employer plan other than SIMPLE 401(k) or SIMPLE IRA

Tax year beginning in:	Dollar limit
2002	$1,000
2003	$2,000
2004	$3,000
2005	$4,000
2006 and thereafter	$5,000

SIMPLE 401(k) or SIMPLE IRA plan

Tax year beginning in:	Dollar limit
2002	$500
2003	$1,000
2004	$1,500
2005	$2,000
2006 and thereafter	$2,500

For tax years beginning after 2006, IRC § 414(v)(2)(C) requires the dollar limits above to be adjusted for cost of living in accordance with IRC § 415(d).

IRC 414(v) Catch-Up Contributions-application to IRC 410(b), 416 and 401(a)(4) (including effective opportunity)

Introduction

Although catch-up contributions for the current plan year are not taken into account for such year in applying IRC §§ 410(b) and 416, catch-up contributions from prior years are taken into account in applying such Code sections. See Treas. Reg. § 1.414(v)-1(d)(3).

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IRC 414(v) Catch-Up Contributions-application to IRC 410(b), 416 and 401(a)(4) (including effective opportunity), Continued

IRC 401(a)(4) and the universal availability requirement of Treas. Reg. § 1.414(v)-1(e)

Treas. Reg. § 1.401(a)(4)-4 discusses the nondiscrimination requirements applicable to the benefits, rights, and features provided a qualified plan. One of the nondiscrimination requirements applicable to benefits, rights, and features is that they meet a current availability requirement. This requirement is simply that each benefit, right , or feature under a plan be available to a nondiscriminatory group of individuals. Since the right to make catch-up contributions would be considered a benefit, right, or feature subject to Treas. Reg. § 1.401(a)(4)-4, the current availability requirement would normally apply; however, Treas. Reg. § 1.414(v)-1(d)(4) provides that the catch-up contribution provisions of an applicable employer plan are deemed to satisfy the current availability requirement.

This is an important exemption from the current availability requirement, since the age 50 individuals would many times be a discriminatory group.

IRC § 414(v)(4) and Treas. Reg. § 1.401(a)(4)-1(e) provide a universal availability requirement. If a qualified plan fails to satisfy this requirement, it will fail to satisfy IRC § 401(a)(4).

Effective opportunity

Under the universal availability requirement, all applicable employer plans of an employer who have participating catch-up eligible participants are treated as a single plan and must allow such participants to make the same election with respect to catch-up contributions. The ability to make the same election is known as effective opportunity under the IRC § 414(v) regulations. In simple terms, an employer will fail to satisfy the universal availability requirement unless all applicable employer plans of the employer begin permitting catch-up contributions under the plans at the same time (i.e., same effective date) and under all the plans, all the catch-up eligible participants must be able to make the same dollar amount of catch-up contributions.

For example, a plan will fail to allow all catch-up eligible participants to make the same dollar amount of catch-up contributions if the terms of the plan would limit some of the catch-up eligible participants under the plan to only 50% of the catch-up limit while all other catch-up eligible participants can contribute 100% of the limit.

For purposes of the universal availability requirement, the aggregation rules of IRC §§ 414(b), (c), (m), and (o) are followed in determining the employer. An employer is permitted to disregard collectively bargained employees when applying the universal availability requirement.

IRC 414(v) Catch-Up Contributions-application to IRC 410(b), 416 and 401(a)(4) (including effective opportunity), Continued

Example of universal availability

To illustrate this requirement, let's suppose an employer maintains 2 applicable employer plans each with participating catch-up eligible participants. Under one plan, participants' salary deferrals are limited to 10% of compensation. In the other plan, participants' salary deferrals are limited to 15% of compensation.

On the surface, you might think this employer will fail the universal availability requirement because catch-up eligible participants in the one plan will likely have a tougher time reaching the 15% of compensation limit than participants in the other plan subject to the 10% limit. This is irrelevant, though, as long as each catch-up eligible participant under either plan who reaches the plan imposed (employer provided) limit can make the same dollar amount of catch-up contributions. In other words, regardless of the reason for the catch-up contribution, the universal availability requirement will be failed by this employer's plans only where one of the plans places a different dollar limit on the amount of catch-up contributions which can be made. For example, if one of the employer's plans limited catch-up contributions to $1,000 each tax year whereas the other plan let catch-up eligible participants make catch-up contributions up to the IRC § 414(v)(2)(B) dollar limit, the universal availability requirement would be failed by this employer's plans. Please note that while it is permissible for a plan or plans to have different plan imposed (i.e., employer-provided) limits for different groups of participants, the universal availability requirement will be failed where a lower plan imposed (employer-provided) limit is applied to catch-up eligible participants.

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IRC 414(v) Catch-Up Contributions-application to IRC 410(b), 416 and 401(a)(4) (including effective opportunity), Continued

Issue with respect to effective opportunity

The effective opportunity rule of the universal availability requirement creates an interesting issue for a plan with a plan- imposed (employer provided) limit. This is because a plan-imposed limit will more than likely prevent NHCEs as opposed to HCEs from reaching the IRC § 401(a)(30) limit (i.e., reason for catch-up contributions). Thus, application of the plan-imposed limit will give HCEs the opportunity to make a higher dollar amount of catch-up contributions than NHCEs. To avoid this problem, such a plan in operation (without the need for specific plan language) will need to allow all participants the opportunity to make elective deferrals in excess of the plan-imposed limit. For example, a plan with a plan-imposed limit on deferrals of 10% of compensation could permit participants each pay period to defer 10% of their compensation and also a pro-rata portion of the applicable dollar catch-up limit (i.e., limit divided by number of pay periods). See Treas. Reg. § 1.414(v)-1(e)(1)(i) and (ii).

Transition relief for 2002 year under Notice 2002-4

Notice 2002-4 provides transition relief under the universal availability requirement for the 2002 year. Under this relief, a plan does not fail the universal availability requirement for the 2002 year solely because the applicable employer plans of an employer implement the catch-up provisions on different dates in 2002 as long as all of the plans begin offering catch-up contributions by October 1, 2002.

Notice 2002-4 also provides relief to the universal availability requirement until further notice where an employer maintains two or more applicable employer plans and one of such plans is qualified under Puerto Rico law. Just because the applicable employer plan qualified under Puerto Rico law does not offer catch-up contributions will not cause the other applicable employer plans of the employer to fail the universal availability requirement.

The Remedial Amendment Period under IRC § 401(B) Applicable To EGTRRA and Its Application to Other Recently Issued Guidance

Introduction

EGTRRA, which was enacted on June 7, 2001, includes numerous changes to the qualified plan rules. Almost all of these changes are effective in years beginning after December 31, 2001. Many of the changes are not mandatory; however, if a plan sponsor chooses to implement an optional provision of EGTRRA, the plan must be amended to conform provisions to plan operation.

The EGTRRA remedial amendment period under Notice 2001-42, in general

In accordance with the authority given the Commissioner under Treas. Reg. § 1.401(b)-1(b)(3) to designate law changes to the qualification requirements as a disqualifying provision, Notice 2001-42, 2001-30 I.R.B. 70, designated as disqualifying provisions under Treas. Reg. § 1.401(b)-1(b) plan provisions that

(1) must be amended to satisfy the qualification requirements of the Code because of changes in those requirements made by EGTRRA, or
(2) are integral to qualification requirements changed by EGTRRA.

For a disqualifying provision described above, the remedial amendment period under IRC § 401(b) is extended (in accordance with the Commissioner's discretion granted under Treas. Reg. § 1.401(b)-1(f)) to a period which shall not end prior to the last day of the first plan year beginning on or after January 1, 2005.

Condition for availability of the EGTRRA RAP

In accordance with the authority granted the Commissioner under Treas. Reg. § 1.401(b)-1(c)(3), a condition is placed on the availability of the EGTRRA remedial amendment period. The condition is the timely adoption by an employer of required good faith EGTRRA plan amendments.

What is good faith?

What is meant by good faith is defined under section III of Notice 2001-42. Application of the good faith standard is discussed elsewhere in this chapter. Please note that the EGTRRA sample amendments of Notice 2001-57 or amendments which are materially similar to these sample amendments are deemed to meet the good faith standard.

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The Remedial Amendment Period under IRC § 401(B) Applicable To EGTRRA and Its Application to Other Recently Issued Guidance, Continued

When is an EGTRRA good faith amendment required?

A plan is required to have a good faith EGTRRA plan amendment in effect for a year if:

1. The plan is required to implement a provision of EGTRRA for the year, or the plan sponsor chooses to implement an optional provision of EGTRRA for the year, and
2. The plan language prior to the amendment is not consistent either with the provision of EGTRRA or with the operation of the plan in a manner consistent with EGTRRA, as applicable.

When is an EGTRRA good faith amendment considered timely adopted?

An EGTRRA good faith amendment is considered timely adopted if it is adopted no later than the later of –

1. the end of the plan year in which the EGTRRA change in the qualification requirements is required to be, or is optionally, put into effect under the plan, or

2. the end of the GUST remedial amendment period for the plan.

See Revenue Procedures 2000-20, 2001-55, 2002-73, and 2003-72, as well as Notice 2001-42 for information relative to the determination of the GUST remedial amendment period for a plan. Of course, this determination is dependent upon whether the employer's plan is an adoption of an individually designed plan or a pre-approved plan.

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The Remedial Amendment Period under IRC § 401(B) Applicable To EGTRRA and Its Application to Other Recently Issued Guidance, Continued

When is an EGTRRA good faith amendment considered timely adopted? (continued)

Please note that an exception exists to the timely adoption date described above. This exception is the result of the application of IRC § 411(d)(6) and is pointed out in section III of Notice 2001-42. IRC § 411(d)(6) prohibits a qualified plan from cutting back or reducing already accrued benefits. EGTRRA does not provide relief from this qualification requirement when a plan adopts amendments as a result of the EGTRRA changes. Thus, a plan amendment reflecting an EGTRRA change adopted with a retroactive effective date could result in the impermissible reduction of already accrued benefits.

Of course, a plan amendment adopted to reflect an EGTRRA change that only eliminates or reduces benefits that have not yet accrued will not violate IRC § 411(d)(6). For this reason, a plan sponsor must examine the EGTRRA plan amendments it is required to adopt and also those it chooses to adopt to determine if an earlier adoption date than otherwise would be required is necessary in order to avoid an IRC § 411(d)(6) violation.

Section III of Notice 2001-42 gives an example of a plan amendment for an EGTRRA change whose adoption date is affected by IRC § 411(d)(6). The example given is the EGTRRA changes to the top-heavy rules. Section III of such notice also provides relief from the requirements of IRC § 411(d)(6) for an amendment adopted to reflect the EGTRRA changes to the top-heavy rules. The relief is basically a deadline within the 2002 plan year for the adoption date of the EGTRAA top-heavy amendment. The deadline is different depending on whether the plan is a DB plan or a DC plan. See below.

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The Remedial Amendment Period under IRC § 401(B) Applicable To EGTRRA and Its Application to Other Recently Issued Guidance, Continued

Revenue Procedure 2004-25 and its addition to the EGTRRA RAP of non-EGTRRA related disqualifying provisions

Under Revenue Procedure 2004-25, the Service passes the EGTRRA remedial amendment period of Notice 2001-42 onto a disqualifying provision described in Treas. Reg. § 1.401(b)-1(b)(1) that is put into effect after December 31, 2001. Thus, a plan first put into effect after December 31, 2001 (i.e., new plan) containing any disqualifying provision (whether it be EGTRRA or non-EGTRRA related), and any amendment (whether it be EGTRRA or non-EGTRRA related) adopted after December 31, 2001 to an existing plan (i.e., a plan in existence prior to 2002) that causes such existing plan to become disqualified, will have until the end of the EGTRRA remedial amendment period to correct such disqualifying provision. This change to the EGTRRA remedial amendment period has no effect on the EGTRRA good faith requirement. In other words, EGTRRA good faith amendments still need to be timely adopted (as defined by Notice 2001-42) to entitle a plan to the EGTRRA remedial amendment period.

Other recently issued guidance specifically given the EGTRRA RAP

The EGTRRA remedial amendment period is also specifically provided to any disqualifying provision resulting from a plan amendment adopted in a timely manner to conform with the guidance provided by the Service in –

1. Revenue Ruling 2002-27,
2. Revenue Ruling 2001-62, and
3. the IRC § 401(a)(9) Final and Temporary Regulations (Revenue Procedure 2002-29).

Each of the above pieces of guidance defines when the particular plan amendment will be considered adopted in a timely manner. Remember, it is the timely adoption of this particular plan amendment that must create the disqualifying provision.

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The Remedial Amendment Period under IRC § 401(B) Applicable To EGTRRA and Its Application to Other Recently Issued Guidance, Continued

Announcement 2004-32 – Results of the White Papers on the future of the Determination Letter Program

The purpose of the announcement is to inform the public of two things. First of all, it announces to the public that the Service has considered all public comments received (from the white papers) on ways to improve the determination letter process, and has decided to proceed with the implementation of a staggered system of remedial amendment periods for individually designed plans. Secondly, it announces to the public that the Service is considering (subject to public comment) the implementation of a six year amendment/approval cycle for pre-approved plans (i.e., M&P plans and volume submitter specimen plans). The announcement indicates the Service intends to implement both of these changes as part of the EGTRRA determination letter program.

Individually designed plans

Under the staggered system for individually designed plans, a plan would have a five (5) year remedial amendment period (RAP). When this five year period will end will vary from one employer's plans to the next depending upon the employers' last digit of their taxpayer identification number (TIN). The RAP would be based on calendar years. Thus, the plan year of a plan would have no bearing on the RAP. This is what is envisioned beginning with the EGTRRA RAP:

Last digit of employer's TIN	EGTRRA RAP ends in	Subsequent 5 year RAP cycles end in
0, 5	2005	2010, 2015, etc
1, 6	2006	2011, 2016, etc
2, 7	2007	2012, 2017, etc
3, 8	2008	2013, 2018, etc
4, 9	2009	2014, 2019, etc

Under the staggered RAP system envisioned, an employer would not have to request a determination letter for their qualified plan(s) more frequently than every five years.

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The Remedial Amendment Period under IRC § 401(B) Applicable To EGTRRA and Its Application to Other Recently Issued Guidance, Continued

Announcement 2004-32 – Results of the White Papers on the future of the Determination Letter Program

The existing rules regarding the RAP would continue to apply to new and terminating plans. The staggered RAP rules would apply to a plan only after its initial RAP. Special RAP rules would apply to multiemployer plans, multiple employer plans, plans maintained by multiple members of a controlled group or affiliated service group, spin-offs, mergers, and a change in sponsorship of a plan.

The Service points out in this announcement that once the staggered RAP system is implemented, it will closely monitor its efficiency and will make appropriate adjustments to it where necessary. These adjustments may come from problems the Service has encountered in its actual experience with the new system and/or they may come from problems encountered by practitioners.

Pre-approved plans

In contrast to the changes to the RAP rules for individually designed plans, the changes to the approval of pre-approved plans and time by which their adopting employers must adopt them described in the announcement are just a proposal. The announcement invites public comment on the proposal as part of any comments submitted in response to Announcement 2004-33.

This is how the proposal would work. The entire process for all pre-approved plans of getting them updated, getting such updates approved by the Service, and then having adopting employers adopt the approved plan, would run on a six year cycle. In year one, all pre-approved defined contribution plans would be required to be updated and submitted for approval to the Service by the end of year one. The Service would process these defined contribution applications in years two and three.

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The Remedial Amendment Period under IRC § 401(B) Applicable To EGTRRA and Its Application to Other Recently Issued Guidance, Continued

Announcement 2004-32 – Results of the White Papers on the future of the Determination Letter Program

Adopting employers would then have a fixed date (i.e., end of year five) to adopt the approved plans. Meanwhile, in year three, all pre-approved defined benefit plans would be required to be updated and submitted for approval to the Service by the end of such year (i.e., year three). The Service would then process these applications in years four and five and the adopting employers would have until the end of year seven to adopt the approved plans. The whole cycle would start over again in year seven.

Please note the proposal intends to eliminate the so-called 12-month rule on which the determination of adopting employers' remedial amendment periods was formerly based. The proposal also indicates that the Service intends for the six year cycle to have some built-in flexibility. In other words, if the needs of practitioners/employers changed, the six year cycle could be changed.

The IRC § 401(a)(17) Compensation Limitation As Amended By EGTRRA.

Introduction

- EGTRRA amended IRC § 401(a)(17) to increase the compensation limitation to $200,000,
- Effective date is plan years beginning after December 31, 2001,
- Amendment is optional,
- Notice 2001-56 provides effective date guidance for plans that use prior year compensation in determining current year accruals or allocations, and
- Revenue Ruling 2003-11 provides guidance relative to the application of this change to former employees.

Explanation of change

IRC § 401(a)(17) limits the annual compensation taken into account by a qualified plan for purposes of determining a participant's benefit accruals under a DB plan or a participant's allocations under a DC plan. This provision also limits the annual compensation taken into account for purposes of certain nondiscrimination requirements, including those in IRC §§ 401(a)(4), 401(a)(5), 401(l), 401(k), 401(m), 404(a)(2), and 410(b)(2), and for purposes of determining whether a definition of compensation is nondiscriminatory under IRC § 414(s)(3).

Prior to EGTRRA, the annual compensation limit was $150,000, indexed in $10,000 increments for cost of living. By 2001, cost of living adjustments had increased the pre-EGTRRA limitation to $170,000.

Effective for allocations or accruals determined in plan years beginning on or after January 1, 2002, EGTRRA increased the annual compensation limit to $200,000. EGTRRA also changed the way in which the compensation limitation is adjusted for cost of living. It is no longer adjusted in increments of $10,000 but is now adjusted in increments of $5,000. The base period for cost of living has also been changed from the calendar quarter beginning October 1, 1993 to the calendar quarter beginning July 1, 2001. One thing EGTRRA did not change, though, regarding the cost of living adjustment is when the adjustment (increase) is applied. The compensation limitation is increased for cost of living as of the beginning of a calendar year, and the increase is applied only with respect to the annual compensation during the plan year or other 12-month period over which compensation is determined (determination period) that begins with or within such calendar year.

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The IRC § 401(a)(17) Compensation Limitation As Amended By EGTRRA., Continued

Explanation of change (continued)

A corresponding change was made by EGTRRA to IRC § 404(l). IRC § 404(l) places a limitation on the amount of compensation which an employer can use in computing its deduction limitation for federal income tax purposes for contributions the employer has made to its qualified plans.

Of course, a plan does not have to implement the EGTRRA increase to the compensation limitation. It could continue to limit compensation used under the plan to the pre-EGTRRA limit.

Application of EGTRRA change to DB plans

Most DB plans provide a normal retirement benefit based on an average for consecutive years of the participant's compensation when it was highest. Thus, each participant's current year accrual will be computed with use of prior year compensation. This presents an interesting problem in applying the IRC § 401(a)(17) compensation limitation of EGTRRA in 2002 and thereafter where the 2002 or later plan year accrual includes compensation earned by the participant in pre-EGTRRA years. What IRC § 401(a)(17) limitation is applied to the pre-EGTRRA compensation when the accrual computation is being done in a plan year in which EGTRRA is effective? Is it the pre-EGTRRA limitation or the EGTRRA limitation?

Notice 2001-56 answers this question. The notice indicates the plan can either limit the pre-EGTRRA compensation to the pre-EGTRRA limit or to the EGTRRA limit. Whatever choice the plan makes, it must set forth the choice in the terms of the plan. The EGTRRA sample amendments of Notice 2001-57 allow for this choice.

Revenue Ruling 2003-11

This revenue ruling answers the question as to whether it is acceptable for a DB plan to be amended to apply the EGTRRA increase to the compensation limitation to the computation of retirement benefits being paid after December 31, 2001 to former employees who retired on or before December 31, 2001. The revenue ruling indicates it is permissible for a DB plan to do this as long as the timing of the amendment, the amount of benefits it provides, and the group of former employees benefiting, is non-discriminatory.

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The IRC § 401(a)(17) Compensation Limitation As Amended By EGTRRA., Continued

Application of EGTRRA change to DC plans

Since most DC plans (an exception would be a target benefit plan) do not use prior year compensation in determining a current year's allocation, the guidance of Notice 2001-56 is generally not applicable. Thus, an employer simply has to decide whether or not it wants to implement under its plan the EGTRRA increase to the compensation limitation for 2002 and later plan years.

IRC §§ 415(c)(1) and 415(d) as amended by EGTRRA

Introduction

- Amendment is required. The reason it is required can be found by a review of Q&A 14 of Revenue Ruling 2001-51.
- A DC plan that correctly incorporates the IRC § 415(c) limits by reference will automatically reflect the EGTRRA changes and need not be amended.
- Statutory effective date is limitation years beginning after December 31, 2001. Statutory effective date is limitation years beginning after December 31, 2001.
- Revenue Ruling 2001-51 provides guidance in the form of Q & A's relative to the EGTRRA increases to the IRC § 415 limitations

Explanation of changes

IRC § 415(c)(1) places a limitation on the amount of annual additions made with respect to a participant's account in a defined contribution plan for a limitation year. The pre-EGTRRA limitation was the lesser of $30,000 (adjusted for cost of living under IRC § 415(d)) or 25% of the participant's compensation.

Effective for limitation years beginning after December 31, 2001, EGTRRA amended IRC § 415(c) to increase the limitation. The limitation under EGTRRA is the lesser of $40,000 (adjusted for cost of living under IRC § 415(d)) or 100% of the participant's compensation. EGTRRA also changed the way in which the dollar limitation is adjusted for cost of living. It is no longer adjusted in multiples of $5,000 but now is adjusted in multiples of $1,000. The base period for cost of living has also been changed from the calendar quarter beginning October 1, 1993 to the calendar quarter beginning July 1, 2001. One thing EGTRRA did not change, though, regarding this cost of living adjustment is when the adjustment (increase) is applied. The $40,000 dollar limitation is increased for cost of living as of the beginning of a calendar year, and the increase is applied only with respect to limitation years that end during that calendar year.

Please keep in mind that a defined contribution plan which correctly incorporates the IRC § 415(c) limitations by reference in accordance with Notice 87-21 will not need to have a specific amendment adopted to it by its employer to have the EGTRRA changes take effect under the terms of the plan. Such a plan will have the EGTRRA increases to the IRC § 415(c) limitation automatically takes effect under the plan for limitation years beginning on or after January 1, 2002.

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IRC §§ 415(c)(1) and 415(d) as amended by EGTRRA, Continued

Revenue Ruling 2001-51

Most of the guidance provided by Revenue Ruling 2001-51 is relative to the EGTRRA changes to the IRC § 415 limitations applicable to DB plans; however, several of the Q & A's (i.e., #9, #10, #11, #14, and #15) are applicable to DC plans. There are two key points to the defined contribution plan guidance provided by this revenue ruling.

- First of all, the guidance explains how to apply the EGTRRA IRC § 415 changes to plan participants and not hinder the plan's acceptability under IRC § 401(a)(4) as either a safe harbor plan or a general tested plan.

- Secondly, the guidance explains how a DC plan's choice to continue to apply the pre-EGTRRA 415 limits in post-EGTRRA limitation years will affect the plan's satisfaction of other qualification requirements.

IRC § 415(b) as Amended by EGTRRA

Introduction

- Amendment (other than the Rev. Rul. 2001-62 amendment) is optional
- A DB plan that correctly incorporates the IRC § 415(b) limits by reference will automatically reflect the EGTRRA changes and need not be amended.
- The statutory effective date is limitation years **ending** after December 31, 2001 (except for the change to IRC § 415(b)(11)). Please note how this effective date is different from the effective date for the EGTRRA 415 changes applicable to DC plans.
- Revenue Ruling 2001-51 provides guidance in the form of Q & A's relative to the EGTRRA increases to the IRC § 415 limitations
- Revenue Ruling 2001-62 requires the use of a new mortality table for purposes of the actuarial adjustments of IRC §§ 415(b)(2)(B), (C), and (D).
- JCWAA provides IRC § 411(d)(6) relief from the increased IRC § 415(b)(1) dollar limitation for plans which incorporate the provisions of IRC § 415 by reference.

Explanation of change to IRC § 415(b)(1)

IRC § 415(b)(1) places a limitation on the annual straight life annuity benefit which a participant is entitled to at any time from a defined benefit plan during a limitation year. The pre-EGTRRA limitation was the lesser of $90,000 (adjusted for cost of living under IRC § 415(d)) or 100% of the participant's average compensation for his high 3 years.

Effective for limitation years ending after December 31, 2001, EGTRRA amended IRC § 415(b)(1) to increase the limitation. The limitation under EGTRRA is the lesser of $160,000 (adjusted for cost of living under IRC § 415(d)) or 100% of the participant's average compensation for his high three years. EGTRRA also changed the base period for cost of living adjustment to the dollar limitation from the calendar quarter beginning October 1, 1986 to the calendar quarter beginning July 1, 2001. One thing EGTRRA did not change, though, regarding this cost of living adjustment is when the adjustment (increase) is applied. The $160,000 limitation is increased for cost of living as of the beginning of a calendar year, and the increase is applied only with respect to limitation years that end during that calendar year.

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IRC § 415(b) as Amended by EGTRRA, Continued

Explanation of changes to IRC § 415(b)(2)(C) & (D)

IRC §§ 415(b)(2)(C) and (D) require actuarial adjustment to be made to the dollar limitation (pre-EGTRRA dollar limitation was $90,000; post-EGTRRA dollar limitation is $160,000) of IRC § 415(b)(1) before applying it to a participant dependent upon the age the participant has attained at the time benefit payments are to commence. The actuarial adjustment can be an increase to the dollar limitation or it can be a decrease. Prior to EGTRRA, these two Code sections required the adjustment to be a reduction where benefit payments commenced prior to the participant attaining social security retirement age and for the adjustment to be an increase where benefit payments commenced after the participant attained social security retirement age.

Effective for limitation years ending after December 31, 2001, EGTRRA amended IRC §§ 415(b)(2)(C) and (D) to change the age at which any actuarial adjustment to the $160,000 limitation of IRC § 415(b)(1) needs to be made. Under EGTRRA, if benefit payments commence to a participant prior to him attaining age 62, the actuarial adjustment is a reduction to the $160,000 limitation. If payment commences between age 62 and age 65, EGTRRA does not require any adjustment be made to the $160,000 limitation. If payment commences after age 65 to the participant, EGTRRA requires the actuarial adjustment to be an increase to the $160,000 limitation. Thus, under EGTRRA, the basis for actuarial adjustment under IRC §§ 415(b)(2)(C) and (D) is no longer tied to whether or not the participant has attained social security retirement age. In addition, under EGTRRA, where the adjustment under these two Code sections needs to be a reduction, use of the Social Security Act reduction factors of 5/9ths of 1% and 5/12ths of 1% in the computation of the reduction has been eliminated.

Incorporation by reference

Please keep in mind that a defined benefit plan which correctly incorporates the IRC § 415(b) limitations by reference in accordance with Notice 87-21 will not need to have a specific amendment adopted to it by its employer to have the EGTRRA changes take effect under the terms of the plan. Such a plan will have the EGTRRA increases to the IRC § 415(b) limitation automatically take effect under the plan for limitation years ending on or after January 1, 2002. Please see the JCWAA relief described below as well as Q&A 13 of Revenue Ruling 2001-51 for ways an employer can use to prevent this automatic increase from occurring.

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IRC § 415(b) as Amended by EGTRRA, Continued

Explanation of change to IRC § 415(b)(11)

Prior to EGTRRA, IRC § 415(b)(11) provided a special limitation rule applicable to a governmental plan (as defined in IRC § 414(d)). Such special rule provided that a governmental plan was not subject to the 100% of a participant's average compensation for his high three years limitation under IRC § 415(b)(1). In other words, under a governmental plan, the annual straight life annuity benefit a participant was entitled to at any time from such plan for any limitation year was only limited to the $90,000 limitation.

Effective for limitation years **beginning** after December 31, 2001, EGTRRA amended IRC § 415(b)(11) to apply the special limitation rule of such Code section to a multiemployer plan (as defined in IRC § 414(f)) in addition to a governmental plan.

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IRC § 415(b) as Amended by EGTRRA, Continued

Revenue Ruling 2001-51

There are several key points to the defined benefit plan guidance provided by this revenue ruling. They are as follows:

1. The guidance provides that the EGTRRA increases to the IRC § 415(b) limitation may be applied by a DB plan to a current or former employee who has already commenced, prior to the effective date of the EGTRRA increases receiving benefits from the plan. The guidance defines who these current or former employees can be and explains how to calculate the increase to their benefit payment.

2. Whenever a qualified plan adopts an amendment to increase benefits, the satisfaction of IRC § 401(a)(4) by such plan as a result of the adoption of such amendment comes into question. For example, was the timing of the adoption of such amendment nondiscriminatory? In addition, if this amendment is extended to former employees, additional nondiscrimination issues arise. Since these types of nondiscrimination issues (i.e., Treas. Reg. § 1.401(a)(4)-5 and 1.401(a)(4)-10) arise when a qualified plan amends for the EGTRRA increases to the IRC § 415 limitations, the guidance addresses how to satisfy these IRC 401(a)(4) issues when amending for EGTRRA. In particular, the guidance states that if the EGTRRA increases to the IRC 415 limitations are applied under a plan as of the EGTRRA effective date to either:

    a) all current and former employees who have an accrued benefit under the plan immediately before the effective date of the EGTRRA increases to the IRC 415 limitations, or

    b) all employees participating in the plan who have one hour of service after the effective date of the EGTRRA increases to the IRC 415 limitations, these IRC 401(a)(4) issues will be deemed satisfied.

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IRC § 415(b) as Amended by EGTRRA, Continued

Revenue Ruling 2001-51 (continued)

If a plan amendment is adopted by an employer which applies the EGTRRA increases to a different group of employees than that described in the previous sentence or if the plan amendment uses a later effective date than the EGTRRA statutory effective date to apply the EGTRRA increases, satisfaction by the plan of these nondiscrimination issues will not be deemed automatic and thus its satisfaction becomes a facts and circumstances determination.

3. The guidance explains how to apply the EGTRRA IRC § 415 changes to plan participants and not hinder the acceptability of the plan's benefit formula under IRC § 401(a)(4) as either a safe harbor formula or a general tested formula.

4. The guidance explains how a DB plan's choice to continue to apply the pre-EGTRRA 415 limits in post-EGTRRA limitation years will affect the plan's satisfaction of other qualification requirements.

5. The guidance explains how to coordinate a defined benefit plan's satisfaction of IRC §§ 411 and 415 where it has a normal retirement age of less than 65 and has participants with accrued benefits limited by the EGTRRA 415 dollar limitation who have reached such age without commencing benefit payments. This coordination with IRC § 411 becomes necessary because under IRC § 415 as amended by EGTRRA, the $160,000 limitation cannot be increased between the ages of 62 and 65.

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IRC § 415(b) as Amended by EGTRRA, Continued

Revenue Ruling 2001-62 as modified by Revenue Procedure 2002-73

Under IRC §§ 415(b)(2)(B), (C), and (D), certain actuarial adjustments may be required to the participant's elected form of benefit payment and to the IRC § 415(b)(1) dollar limitation before the IRC § 415 limitations can be applied to the participant. IRC § 415(b)(2)(E)(v) requires a defined benefit plan to use a prescribed mortality table for purposes of the actuarial adjustments of IRC §§ 415(b)(2)(B), (C), and (D). The purpose of Revenue Ruling 2001-62 is to change this prescribed mortality table and to provide the new mortality table.

The revenue ruling indicates that a defined benefit plan must adopt an amendment to require the use of the new mortality table for the purposes described above by the later of the last day of the plan year which contains the revenue ruling's effective date or the last day of the plan's GUST remedial amendment period. The revenue ruling goes on to say that any disqualifying provision resulting from a plan's adoption of such amendment will be given the EGTRRA remedial amendment period. Thus, even though the mortality table provided by this revenue ruling is not technically an EGTRRA change, the fact a possible disqualifying provision resulting from a DB plan's amending for such revenue ruling is given the EGTRRA remedial amendment period for correction in essence makes the revenue ruling an EGTRRA change.

Please note the revenue ruling provides model amendments which a DB plan can use to amend for the new mortality table and be assured no disqualifying provision has resulted from such amendment. In addition, the revenue ruling indicates it is acceptable for a DB plan to amend for the new mortality table by simply incorporating by reference the revenue ruling.

JCWAA relief under IRC § 411(d)(6)

Because a DB plan which properly incorporates by reference the requirements of IRC § 415 may have the EGTRRA increase to the IRC § 415(b)(1) dollar limitation become effective sooner than it desires or realizes, JCWAA modified EGTRRA § 611 to allow a DB plan to retroactively adopt an amendment which limits benefits under IRC § 415 to their pre-EGTRRA level without fear of violating IRC § 411(d)(6). There are several requirements which a DB plan must satisfy to avail itself of this relief. One of the requirements is that the amendment be adopted on or before 6/30/2002. Please refer to section 611(i)(3) of EGTRRA as added by JCWAA for the remaining requirements. Finally, please note this is an exception to Q&A 13 of Revenue Ruling 2001-51. See beginning of this Chapter for the actual requirements.

IRC § 415(f) as amended by EGTRRA

Introduction

– The statutory effective date is limitation years **beginning** after December 31, 2001

– The amendment is optional

Explanation of change to IRC § 415(f)

Under IRC § 415(f), aggregation rules are described which an employer who maintains more than one plan must follow in applying the limits of IRC § 415. Prior to EGTRRA, the regulations under this Code section indicated that a multiemployer plan is not aggregated with another multiemployer plan when applying the IRC § 415 limits to each plan. In addition, where a non-multiemployer plan and multiemployer plan of an employer have a common participant, such regulations required the plans to be aggregated when applying the IRC 415 limitations to such participant.

Effective for limitation years beginning after December 31, 2001, EGTRRA amended IRC § 415(f) to add paragraph (3). Paragraph (3) indicates that a multiemployer plan is not combined or aggregated (a) with a non-multiemployer plan for purposes of applying the 100% of compensation limitation of IRC § 415(b)(1)(B) to the non-multiemployer plan, or (b) with any other multiemployer plan for purposes of applying the limitations of IRC § 415.

IRC § 402(g)(1) as amended by EGTRRA

Introduction

– The amendment is optional for an IRC § 401(k) plan

– An IRC § 401(k) plan which correctly incorporates the limitation on elective deferrals of IRC § 402(g) by reference in accordance with Treas. Reg. § 1.401(a)-30 will have the EGTRRA changes to IRC § 402(g) automatically take effect under the plan

– The effective date is years beginning after December 31, 2001

Explanation of changes to IRC § 402(g)(1)

IRC § 402(g)(1) places a limitation on the amount of elective deferrals as defined under IRC § 402(g)(3) (e.g., amounts contributed under an IRC § 401(k) qualified cash or deferred arrangement) which an individual can exclude from their taxable income each tax year. IRC § 401(a)(30) provides that an IRC § 401(k) plan shall not be qualified unless the terms of the plan require its elective deferrals not to exceed the IRC § 402(g)(1) limitation.

Prior to EGTRRA, IRC § 402(g)(1) defined the limitation to be $7,000 (adjusted for cost of living under IRC § 402(g)(5)). By 2001, the cost of living adjusted figure had reached $10,500.

Effective for years beginning after December 31, 2001, EGTRRA (as modified by JCWAA) amended IRC § 402(g)(1) to increase the limitation on the amount of elective deferrals excludable from taxable income. The EGTRRA increase of $4,500 to the limitation is phased in over a five year period. The applicable dollar amount effective as of January 1 of each calendar year reflecting the phase in is contained in a table under IRC § 402(g)(1)(B). The table is as follows:

YEAR	LIMITATION
2002	$11,000
2003	$12,000
2004	$13,000
2005	$14,000
2006 & after	$15,000

Continued on next page

IRC § 402(g)(1) as amended by EGTRRA, Continued

Explanation of changes to IRC § 402 (g)(1) (continued)

Once 2006 has passed, any future increases to the limitation under EGTRRA will occur as a result of cost of living adjustments. The cost of living adjustment to the $15,000 amount will still be done in $500 multiples as under pre-EGTRRA law, but the base period for the adjustment has been changed under EGTRRA to the calendar quarter beginning July 1, 2005. See IRC § 402(g)(4) as amended by EGTRRA.

In addition to EGTRRA increasing the IRC § 402(g)(1)(A) limitation described above, EGTRRA (as modified by JCWAA) also added IRC § 402(g)(1)(C) which discusses catch-up contributions. This change to IRC § 402(g) was done simply to keep the requirements of such Code section in agreement with the newly created IRC § 414(v). In other words, IRC § 402(g)(1)(C) simply provides that any catch-up contributions permitted under IRC § 414(v) will be an addition to the exclusion limitation of IRC § 402(g)(1)(A).

Application of the limitation of IRC § 402(g)(1) to other retirement plans

Please keep in mind that the exclusion limitation of IRC § 402(g)(1) also applies to the elective deferrals made by an individual to an IRC § 403(b) tax sheltered annuity plan, an IRC § 408(k) simplified employee pension plan under, an IRC § 408(p) SIMPLE IRA, and an IRC § 401(k)(11) SIMPLE 401(k) plan. If an individual contributes elective deferrals to more than one of the retirement plans subject to the limitation under IRC § 402(g)(1), all of the elective deferrals must be aggregated in applying the limitation to the individual regardless of the plans being maintained by the same employer.

IRC §§ 408(p)(2)(A)(ii) & 408(p)(2)(E) as Amended by EGTRRA

Introduction

– The amendment is optional for a SIMPLE 401(k) plan

– The effective date is years beginning after December 31, 2001

In addition to the exclusion limitation of IRC § 402(g)(1), IRC §§ 408(p)(2)(A)(ii) and 408(p)(2)(E) contain a separate exclusion limitation from taxable income on the elective deferrals made by an individual to a SIMPLE 401(k) plan or SIMPLE IRA.

Prior to EGTRRA, IRC § 408(p)(2)(A)(ii) defined the limitation to be $6,000 (adjusted for cost of living under IRC § 408(p)(2)(E)). By 2001, the cost of living adjusted figure had reached $6,500.

Effective for years beginning after December 31, 2001, EGTRRA amended IRC §§ 408(p)(2)(A)(ii) and 408(p)(2)(E) to increase the limitation on the amount of elective deferrals excludable from taxable income under a SIMPLE 401(k) plan or SIMPLE IRA. The EGTRRA increase of $3,500 to the limitation is phased in over a four year period. The applicable dollar amount effective as of January 1 of each calendar year reflecting the phase in is contained in a table under IRC § 408(p)(2)(E). The table is as follows:

YEAR	LIMITATION
2002	$7,000
2003	$8,000
2004	$9,000
2005 & thereafter	$10,000

Once 2005 has passed, any future increases to the limitation under EGTRRA will occur as a result of cost of living adjustments. The cost of living adjustment to the $10,000 amount will still be done in $500 multiples as under pre-EGTRRA law, but the base period for the adjustment has been changed under EGTRRA to the calendar quarter beginning July 1, 2004.

IRC § 416(c)(1)(C) as amended by EGTRRA

Introduction

– Amendment is required

– Effective Date is plan years beginning after December 31, 2001

– Notice 2001-56 provides guidance with respect to the effective date of the EGTRRA changes to IRC § 416. This guidance is necessary due to the fact that the top-heavy determination date with respect to any plan year is the last day of the preceding plan year. Thus, for the 2002 plan year of a plan, the determination date for such plan year will be the last day of the 2001 plan year (a date which is prior to the effective date of the EGTRRA changes). Nevertheless, the notice indicates the EGTRRA changes to IRC § 416 must be applied as of this determination date so that such changes will be reflected in the 2002 plan year

Explanation of change to IRC § 416(c)(1)(C)

IRC § 416(c)(1)(C) defines the years of service which a DB plan must take into account in computing the top-heavy minimum benefit accrual which must be provided to a non-key employee for each year in which the plan is top-heavy. Prior to EGTRRA, a frozen DB plan still had to provide the top-heavy minimum accrual to non-key employees even though under the frozen plan key employees and former key employees were accruing no benefit.

Effective for plan years beginning after December 31, 2001, EGTRRA amended IRC § 416(c)(1)(C) to no longer require a frozen top-heavy DB plan to provide the top-heavy minimum accrual to non-key employees for years in which key employees and former key employees accrue no benefit.

IRC § 416(c)(2)(A) as Amended by EGTRRA

Introduction

– Amendment is required

– Effective Date is plan years beginning after December 31, 2001

– Notice 2001-56 provides guidance with respect to the effective date of the EGTRRA changes to IRC § 416. This guidance is necessary due to the fact that the top-heavy determination date with respect to any plan year is the last day of the preceding plan year. Thus, for the 2002 plan year of a plan, the determination date for such plan year will be the last day of the 2001 plan year (a date which is prior to the effective date of the EGTRRA changes). Nevertheless, the notice indicates the EGTRRA changes to IRC § 416 must be applied as of this determination date so that such changes will be reflected in the 2002 plan year

Explanation of change to IRC § 416(c)(2)(A)

IRC § 416(c)(2)(A) defines the minimum benefit which a top-heavy DC plan must provide to each non-key employee for each plan year in which the plan is top-heavy. Prior to EGTRRA, matching contributions (as defined in IRC § 401(m)(4)(A) contributed to non-key employees by the employer were not permitted to be taken into account by the employer for purposes of satisfying the minimum benefit it must provide to non-key employees in each plan year for which the DC plan was top-heavy.

Effective for plan years beginning after December 31, 2001, EGTRRA amended IRC § 416(c)(2)(A) to now permit matching contributions contributed to non-key employees in a top-heavy plan year to be taken into account for purposes of the employer's satisfaction of the top-heavy minimum benefit requirement.

IRC § 416(g)(3) as Amended by EGTRRA

Introduction

– Amendment is required

– Effective Date is plan years beginning after December 31, 2001

– Notice 2001-56 provides guidance with respect to the effective date of the EGTRRA changes to IRC § 416. This guidance is necessary due to the fact that the top-heavy determination date with respect to any plan year is the last day of the preceding plan year. Thus, for the 2002 plan year of a plan, the determination date for such plan year will be the last day of the 2001 plan year (a date which is prior to the effective date of the EGTRRA changes). Nevertheless, the notice indicates the EGTRRA changes to IRC § 416 must be applied as of this determination date so that such changes will be reflected in the 2002 plan year.

Explanation of change to IRC § 416(g)(3)

IRC § 416(g)(3) discusses the rule for the inclusion of distributions in the calculation of the top-heavy ratio for a plan or an aggregation group. Prior to EGTRRA, this Code section required the inclusion to be the aggregate amount of all distributions made to an employee during the five year period ending on the determination date.

Effective for plan years beginning after December 31, 2001, EGTRRA amended IRC § 416(g)(3) to reduce the look-back period for the inclusion of distributions from five years to the one year period ending on the determination date; however, if the reason for the distribution to the employee is other than for separation from service, death, or disability (in other words, an in-service distribution), the five year look-back period still applies.

IRC § 416(g)(4)(E) as Amended by EGTRRA

Introduction

– Amendment is required

– Effective Date is plan years beginning after December 31, 2001

– Notice 2001-56 provides guidance with respect to the effective date of the EGTRRA changes to IRC § 416. This guidance is necessary due to the fact that the top-heavy determination date with respect to any plan year is the last day of the preceding plan year. Thus, for the 2002 plan year of a plan, the determination date for such plan year will be the last day of the 2001 plan year (a date which is prior to the effective date of the EGTRRA changes). Nevertheless, the notice indicates the EGTRRA changes to IRC § 416 must be applied as of this determination date so that such changes will be reflected in the 2002 plan year

Explanation of change to IRC § 416(g)(4)(E)

IRC § 416(g)(4)(E) discusses the rule for the inclusion of the accrued benefit (DB plan) or account balance (DC plan) of an employee who has performed no service in the calculation of the top-heavy ratio for a plan or an aggregation group. Prior to EGTRRA, this Code section required this employee's accrued benefit or account balance to be included in the top-heavy ratio unless the employee failed to perform service for the employer for a five year period ending on the determination date.

Effective for plan years beginning after December 31, 2001, EGTRRA amended IRC § 416(g)(4)(E) to reduce the period in which no service is performed from five years to the one year period ending on the determination date.

IRC § 416(g)(4)(H) as Added by EGTRRA

Introduction

- Amendment is required for an IRC § 401(k)(12) safe harbor plan
- Effective Date is plan years beginning after December 31, 2001
- Revenue Ruling 2004-13 provides clarifying guidance with respect to the application of the top-heavy exemption provided by IRC § 416(g)(4)(H)
- Notice 2001-56 provides guidance with respect to the effective date of the EGTRRA changes to IRC § 416. This guidance is necessary due to the fact that the top-heavy determination date with respect to any plan year is the last day of the preceding plan year. Thus, for the 2002 plan year of a plan, the determination date for such plan year will be the last day of the 2001 plan year (a date which is prior to the effective date of the EGTRRA changes). Nevertheless, the notice indicates the EGTRRA changes to IRC § 416 must be applied as of this determination date so that such changes will be reflected in the 2002 plan year

Explanation of addition of IRC § 416(g)(4)(H)

EGTRRA amended IRC § 416(g)(4) to add subparagraph (H) effective for plan years beginning after December 31, 2001. Under this subparagraph, a plan which consists solely of a cash or deferred arrangement which meets the requirements of IRC § 401(k)(12) and matching contributions with respect to which the requirements of IRC § 401(m)(11) are met is exempted from the top-heavy rules.

Revenue Ruling 2004-13

The revenue ruling describes four (4) situations involving an IRC § 401(k)(12) safe harbor plan and indicates whether such plan under the various situations satisfies the top-heavy exemption of IRC § 416(g)(4)(H). What makes the determination of satisfaction of the exemption unusual in each of the four (4) situations is the inclusion under the plan of a discretionary non-elective employer contribution feature and the plan's use of age 21 and 1 year of service for eligibility under the plan.

IRC § 416(i)(1) as amended by EGTRRA

Introduction

– Amendment is required

– Effective Date is plan years beginning after December 31, 2001

– Notice 2001-56 provides guidance with respect to the effective date of the EGTRRA changes to IRC § 416. This guidance is necessary due to the fact that the top-heavy determination date with respect to any plan year is the last day of the preceding plan year. Thus, for the 2002 plan year of a plan, the determination date for such plan year will be the last day of the 2001 plan year (a date which is prior to the effective date of the EGTRRA changes). Nevertheless, the notice indicates the EGTRRA changes to IRC § 416 must be applied as of this determination date so that such changes will be reflected in the 2002 plan year

Explanation of change to IRC § 416(i)(1)

IRC § 416(i)(1) defines a key employee for purposes of the top-heavy requirements. Prior to EGTRRA, an employee could be considered a key employee by reason of falling into one of four different categories. In addition, the look-back period a plan had to use in determining its key employees for purposes of the top-heavy ratio was a five year period ending on the determination date.

Effective for plan years beginning after December 31, 2001, EGTRRA amended IRC § 416(i)(1) to reduce the number of categories requiring an employee to be considered a key employee from four to three categories. The three categories are:

i. an officer of the employer having an annual compensation greater than $130,000,
ii. a 5% owner of the employer, or
iii. a 1% owner of the employer having an annual compensation from the employer of more than $150,000.

EGTRRA also amended IRC § 416(i)(1) to reduce the period used by a plan to determine its key employees for purposes of the top-heavy ratio from five year to a one year period ending on the determination date.

Finally, EGTRRA amended IRC § 416(i)(1) to provide that the $130,000 amount used in the determination of key employees shall be adjusted for cost of living for plan years beginning after December 31, 2002. The cost of living adjustment shall be in multiples of $5,000 and the base period for the adjustment is the calendar quarter beginning July 1, 2001.

IRC § 411(d)(6) Issues With Respect To the Adoption of the Good Faith Amendment for the EGTRRA Changes to the Top-Heavy Rules Discussed In Notice 2001-42

Section III of Notice 2001-42

One of the purposes of Notice 2001-42 is to explain the date by which a qualified plan must adopt its EGTRRA good faith amendments. In explaining this date, the notice points out that the anti-cutback rules of IRC § 411(d)(6) may require a qualified plan to adopt certain EGTRRA good faith amendments earlier than otherwise would be required. One of the EGTRRA good faith amendments the notice indicates will require earlier adoption due to IRC § 411(d)(6) is the good faith amendment necessary to reflect the EGTRRA changes to IRC § 416.

In order to provide relief from the requirements of IRC § 411(d)(6) for purposes of adopting a good faith amendment for the EGTRRA changes to the top-heavy rules, the notice provides a date by which a qualified plan can adopt this good faith amendment and not worry it has caused an IRC § 411(d)(6) violation. This date is different depending on whether the qualified plan is a DC plan or DB plan. The adoption date for a DC plan is any date as long as it is before the last day of the 2002 plan year. The adoption date for a DB plan is any date as long as it is before May 31, 2002, or, in the case of a DB plan that credits service using elapsed time, March 31, 2002.

IRC § 404(n) as added by EGTRRA

Introduction

– Amendment is optional

– Effective Date: Years beginning after December 31, 2001.

Explanation of provision

Elective deferral contributions are not subject to the deduction limits, and the application of a deduction limitation to any other employer contribution to a qualified retirement plan does not take into account elective deferral contributions.

IRC § 404(a)(3)(A) as amended by EGTRRA

Introduction

– Amendment is optional

– Effective Date: Years beginning after December 31, 2001.

Explanation of provision

The annual limitation on the amount of ***contributions to a profit-sharing or stock bonus plan that is deductible is increased from 15 percent to 25*** percent of compensation of the employees covered by the plan, for the year. Also, except to the extent provided in regulations, a money purchase pension plan is treated like a profit-sharing or stock bonus plan for purposes of the deduction rules.

Finally, the definition of compensation for purposes of the deduction rules includes salary reduction amounts ***included in the definition of compensation under IRC § 415.***

IRC §§ 404(a)(1) and 4975(c) as Amended by EGTRRA

Introduction

– Amendment is optional

– Effective Date: Plan years beginning after December 31, 2001

Explanation of provision

The special rule allowing a deduction for ***unfunded*** current liability generally is extended to all defined benefit pension plans, i.e., the provision applies to multiemployer plans and plans with 100 or fewer participants. The special rule does not apply to plans not covered by the PBGC termination insurance program.

The provision also modifies the special rule by providing that the deduction is for up to 100 percent of ***unfunded*** termination liability, determined as of the end of the plan year in which the plan terminated.

In the case of a plan with less than 100 participants for the plan year, termination liability does not include the liability attributable to benefit increases for highly compensated employees resulting from a plan amendment which was made or became effective, whichever is later, within the last two years before the date of termination.

Faster Vesting of Employer Matching Contributions- 411(a)(12)

Introduction

– EGTRRA § 633

– Amendment is required

– Effective Date:- Contributions made for plan years beginning after December 31, 2001. The provision does not apply to any employee until the employee has an hour of service after the effective date. In applying the new vesting schedule, service before the effective date is taken into account.

Pre-EGTRRA

Matching contributions can vest under either a five-year cliff or a seven-year graded vesting schedule.

Post EGTRRA

Plans that provide for matching contributions, as defined in IRC § 401(m)(4)(A), that do not vest at least as rapidly as under one of the two alternative schedules in EGTRRA §633 (***either 6 year graded or 3 year cliff, based on years of service)*** must be amended to satisfy EGTRRA §633 for contributions for plan years beginning after December 31, 2001.

Collective bargaining agreements

In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified by the date of the enactment of this Act, the amendments made by this section shall not apply to contributions on behalf of employees covered by any such agreement for plan years beginning before the earlier of-

(A) the later of-

(i) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof on or after such date of the enactment); or

(ii) January 1, 2002, or

(B) January 1, 2006

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IRC §§ 404(a)(1) and 4975(c) as Amended by EGTRRA,
Continued

Practitioners' Alert

Although the vesting changes are favorable to the employee, they could potentially cost employers more money in that there might be fewer forfeitures for short term employees. Agents should review the plans that amend their vesting schedules to comply with EGTRRA to make sure that the amount of the matching contributions are not also being reduced and if so, verify that all of the appropriate safeguards are in place for the accrued benefits.

References

Notice 2001-57, IRC 411(a)(12) and EGTRRA § 633.

Repeal of Multiple Use Test

Introduction

– EGTRRA § 666

– Amendment is required for plans subject to the multiple use test

– Effective Date:- Years beginning after December 31, 2001.

– The provision repeals the multiple use test

Pre-EGTRRA

The Multiple Use test prevented an employer from using more than once the alternative limitation (two times or plus two) to pass the IRC § 401(k) Actual Deferral Percentage test and the IRC § 401(m) Actual Contribution Percentage test.

Post-EGTRRA

This limitation is removed and no longer applies.

Practitioners' Note

The removal of this limitation will allow Highly Compensated Employees to contribute greater amounts to the plan. Look for changes in the contribution or benefit formulas for plans that were once subject to this test.

References

Notice 2001-57, IRC 401(m)(9) and EGTRRA § 666.

Distributions from 401(k) Plan - Hardship

Introduction

– EGTRRA § 636(a)

– Amendment is required for all 401(k) Safe Harbor Plans

– Language is optional for all other 401(k) Plans

– Effective Date:- Calendar years beginning after December 31, 2001

Pre-EGTRRA

In order to meet the safe-harbor requirements, plans had to provide that no participant be allowed to make IRC § 401(k) contribution for 12-months after the hardship distribution.

Post-EGTRRA

The period of this prohibition is reduced from 12-months to 6-months. Additionally, hardship withdrawals will not be treated as "eligible rollovers distributions."

Explanation of provision

1. Section 636(a) of EGTRRA directs the Secretary of the Treasury to revise the regulations relating to hardship distributions under IRC § 401(k)(2)(B)(i)(IV) to provide that the period during which an employee is prohibited from making elective and employee contributions in order for a distribution to be deemed necessary to satisfy financial need shall be equal to 6 months.

2. Beginning in 2002, for a plan that uses the safe harbor hardship provisions of Treas. Reg. § 1.401(k)-1(d)(2)(iv)(B), the amount of elective contributions that a participant is permitted to make in the year following a hardship distribution is no longer required to be limited to the amount of elective contributions permitted under IRC § 402(g) for that year minus the amount of the elective contributions made in the year of the hardship. Notice 2002-4

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Distributions from 401(k) Plan - Hardship, Continued

Explanation of provision (continued)

3. In addition, any distribution made upon hardship of an employee is not an eligible rollover distribution. Thus, such distributions may not be rolled over, and are not subject to the withholding rules applicable to distributions that are not eligible rollover distributions.

4. The provision does not modify the rules under which hardship distributions may be made. For example, as under present law, hardship distributions of qualified employer matching contributions are only permitted under the rules applicable to elective deferrals.

Practitioners' Note

The guidance, as issued, allows employers greater flexibility when dealing with hardship withdrawals. Look for plan language that will attempt to be as liberal as possible in plans that allow hardship distributions.

References

Notice 2002-4, Notice 2001-56, Notice 2001-57 and EGTRRA § 636(a).

Distributions from IRC § 401(k) Plans - Severance from Employment (Same Desk Rule)

Introduction

– EGTRRA § 646,

– Amendment is optional,

– Effective Date:- Applies to distributions after December 31, 2001, regardless of when the severance of employment occurred

Pre-EGTRRA

Previously, IRC § 401(k) plan distributions were only allowed under certain circumstances aside from the attainment of the participant's normal retirement age. Those circumstances included, the attainment of age 59½, participant hardship, excess contributions, termination of the plan without establishment of another DC plan type, or "separation from service". Under the "same desk" rule, an employee performing the same job for a new employer in the same location (i.e. at the same desk on Monday that you were at on Friday, despite a change of control to the company) was not deemed to have suffered a separation from service. This employee, despite working for a new employer, could not take a penalty-free distribution unless one of the other factors mentioned above had occurred.

Rev. Rul. 2000-27 softened that rule by stating that if in fact there has been a transfer of assets and the participant is working for a new employer that is not part of the former control group, then the Service will deem this to be a separation from service as applicable under § 402(d)(4)(A)(iv).
The Rev. Rul. holds that the distributions were made after a separation of service in accordance with 401(k)(2)(B)(i)(I). IRC § 402(d)(4)(A)(iv) is not in effect after 12/31/99.

Post-EGTRRA

Under EGTRRA, the term "severance from employment" replaces "separation from service" This change removes the obstacles that the "same desk" rule created.

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Distributions from IRC § 401(k) Plans - Severance from Employment (Same Desk Rule), Continued

Explanation of provision

This provision modifies the distribution restrictions applicable to IRC §§ 401(k) plans, 403(b) annuities, and 457 plans to provide that distributions may occur upon "severance from employment" rather than "separation from service."

In addition, the provisions for distribution from an IRC § 401(k) plan based upon a corporation's disposition of its assets or a subsidiary are repealed. This special rule is no longer necessary under the provision.

Practitioners' Note

Look for more and more plans making this amendment and adopting these rules. The same desk rule was not very well liked by many practitioners due to the fact that the buyer of a company was in most instances stuck with the retirement plan of the seller. This new rule will in many instances avoid this result. Now the buyer can offer the employees a distribution based on a severance from employment.

References

Notice 2001-57, IRC 401(k)(2)(B), IRC 401(k)(10) and EGTRRA § 646.

Elimination of IRS User Fees for Certain Determination Letter Requests

Introduction

– EGTRRA § 620

– Effective Date: Determination letter requests made after December 31, 2001.

Explanation of Provision

In general, EGTRRA eliminated user fees for new plans of small employers under certain conditions, effective for determination letter requests filed on or after January 1, 2002.

An employer is an eligible employer if the employer had;

(i) at least one employee who was not a highly compensated employee (within the meaning of § 414(q) of the Internal Revenue Code) and who participated in the plan for the plan year preceding the determination letter request, and

(ii) no more than 100 employees who received at least $ 5,000 of compensation from the employer for the calendar year preceding the request.

A smaller employer (100 or fewer employees) is not required to pay a user fee for a determination letter request with respect to the qualified status of a retirement plan that the employer maintains if the request is made before:

(i) the last day of the fifth plan year after the establishment of the plan, or

(ii) if the request is made before the end of the plan's first remedial amendment period and the plan was in existence less than five years prior to the beginning of the plan's first remedial amendment period.

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Elimination of IRS User Fees for Certain Determination Letter Requests, Continued

Notice 2003-49

Notice 2003-49 provides guidance to help employers determine whether they are required to pay a user fee for a determination letter application. The IRS clarifies that, among other things, a determination letter application for a defined contribution plan that is filed within the plan's EGTRRA remedial amendment period may be exempt from the user fee if the plan started on or after January 2, 1997. (Note that the earliest date on which a defined contribution plan's EGTRRA remedial amendment period could have begun is January 1, 2002.)

The guidance in Notice 2003-49 amplifies the guidance in Notice 2002-1, 2002-1 C.B. 283, by describing when the EGTRRA remedial amendment period begins for purposes of determining if a determination letter application is eligible for elimination of the user fee. The guidance in Notice 2003-49, in conjunction with Notice 2002-1, is designed to help a plan sponsor determine if it is required to pay a user fee for a determination letter application. Notice 2003-49 expressly provides that its guidance does not supersede the guidance provided in Notice 2002-1.

Section 620 of EGTRRA did not eliminate user fees for any determination letter request made after the later of

a. the fifth plan year the plan is in existence or

b. the end of any remedial amendment period with respect to the plan beginning within the first 5 plan years.

The provisions only apply to requests by employers for determination letters concerning the qualified retirement plans they maintain. Therefore, a sponsor of a prototype plan or volume submitter plan is required to pay a user fee for a request for an opinion or advisory letter.

A small employer that adopts a prototype or volume submitter plan, however, is not required to pay a user fee for a determination letter request with respect to the employer's plan, if they meet the above criteria.

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Elimination of IRS User Fees for Certain Determination Letter Requests, Continued

Notice 2002-1

Notice 2002-1 provides guidance on section 620 of EGTRRA, including guidance on who is an eligible employer, when a plan is in existence, and the types of determination letter requests that are eligible for elimination of the user fee. Notice 2002-1, Q&A-12, provides guidance on when the GUST remedial amendment period begins for purposes of determining if a user fee is eliminated.

Notice 2001-42 provides a remedial amendment period for EGTRRA ending no earlier than the end of the 2005 plan year. The EGTRRA remedial amendment period is available to plans that timely adopt good faith plan amendments for EGTRRA.

For a defined contribution plan, the earliest date on which the plan's EGTRRA remedial amendment period could have begun is January 1, 2002. The first day of the 5-year period ending on January 1, 2002 is January 2, 1997. Thus, if a determination letter application for a defined contribution plan is filed within the plan's EGTRRA remedial amendment period, the application may be eligible for elimination of the user fee provided the plan was first in existence *after* January 1, 1997.

For a defined benefit plan, the earliest date on which the plan's EGTRRA remedial amendment period could have begun is January 2, 2001. The first day of the 5-year period ending on January 2, 2001 is January 3, 1996. Thus, if a determination letter application for a defined benefit plan is filed within the plan's EGTRRA remedial amendment period, the application may be eligible for elimination of the user fee provided the plan was first in existence *after* January 2, 1996.

Pursuant to Q&A-12 of Notice 2002-1, if a determination letter application for a plan is filed within the plan's GUST remedial amendment period, the application may be eligible for elimination of the user fee provided the plan was first in existence *on* or *after* December 9, 1989.

References

Notice 2003-49, Notice 2002-1 and EGTRRA § 620.

ESOP Dividends May Be Reinvested Without Loss of Dividend Deduction

Introduction

– EGTRRA § 662,

– Amendment is optional,

– Effective Date: Taxable years beginning after December 31, 2001.

Pre-EGTRRA

C-Corporations may deduct ESOP dividends if they are paid in cash to participants, or are used to pay off loans associated with the ESOP.

Post-EGTRRA

C-Corporations that reinvest the dividends in employer stock that give participants the option to reinvest dividends in employer stock, or receive the dividends in cash may now receive the deduction.

Explanation of provision

In addition to the deductions permitted under present law for dividends paid with respect to employer securities that are held by an ESOP, an employer is entitled to deduct dividends that, at the election of plan participants or their beneficiaries, are:

(1) payable in cash directly to plan participants or beneficiaries,

(2) paid to the plan and subsequently distributed to the participants or beneficiaries in cash no later than 90 days after the close of the plan year in which the dividends are paid to the plan, or

(3) paid to the plan and reinvested in qualifying securities.

The provisions permit the Secretary to disallow the deduction for any ESOP dividend if the Secretary determines that the dividend constitutes, in substance, the avoidance or evasion of taxation.

References

IRC § 404(k)(2), EGTRRA § 662.

Prohibited allocations of stock in an S-Corp. ESOP

Introduction

– EGTRRA § 656,

– Amendment is required,

– Effective Date**:** Generally effective with respect to plan years beginning after December 31, 2004. In the case of an ESOP established after March 14, 2001, or an ESOP established on or before such date if the employer maintaining the plan was not an S corporation on such date, the provision is effective with respect to plan years ending after March 14, 2001.

Pre-EGTRRA

S-corporations are using ESOPs to shelter business income from taxes. Through the use of various elaborate schemes, S-corps are using the tax exemption for earnings on S-corporation stock held by an ESOP to lead to unallowable tax deferrals or in some cases avoidance of tax liability all together.

History

The reason that this has become an important issue is because recently, some practitioners and employers have been using S-Corp. ESOPs to shelter business income from taxes. The IRS has identified three main types of abuses. Those scenarios typically include:

- Shell Corporations formed by promoters prior to March 14, 2001 and sold to employers after that date in order to manipulate the 409(p) effective date (i.e., to use the December 31, 2004 effective date). Rev. Rul. 2003-6.

- Certain operating company owners establish S-Corp. management companies with the stock of these companies owned by an ESOP. The operating company pays a management fee to the management company S-Corp. The owners of the S-Corp. management co. take a modest salary from the corp. with the rest of the fee diverted to the ESOP as the owner of the corporation. The S-Corp. management co. also agrees to provide "nonqualified deferred compensation" to certain executives in an amount equal to substantially all the profits of the management company, thus draining the value from the stock held by the rank-and-file through the ESOP. Treas. Reg. §1.409(p)-1T.

Continued on next page

Prohibited allocations of stock in an S-Corp. ESOP, Continued

History (continued)

- To avoid 409(p), employers and business owners terminated their relationship with their existing businesses and became employees of QSUBs (qualified subchapter S subsidiaries under IRC § 1361(b)(3)) previously established by S-corps. Each QSUB continued the business of the taxpayer but the taxpayer received a reduced salary. The S-Corp. established an ESOP which held 100% of the stock of the S-Corp. The S-Corp. treated the earnings of the QSUB as earned by the S-Corp. which were nontaxable because the corporation was wholly-owned by the ESOP and the earnings were not distributed. The taxpayer is the investment manager of the QSUB and holds an option to purchase shares in the QSUB. Rev. Rul. 2004-4 addresses this issue using three different scenarios and states that the stock options would be synthetic equity.

In using these scenarios, some practitioners, employers and taxpayers have been avoiding taxation of corporate income.

Post-EGTRRA

EGTRRA § 656(d)(2) amended IRC § 409 dealing with qualifications for tax credits for ESOPs. The changes are generally effective for plan years beginning after December 31, 2004. However, pursuant to EGTRRA § 656(d)(2), IRC § 409(p) is effective for plan years ending after March 14, 2001, for an ESOP that is established after that date, or if the employer securities held by the plan consist of stock in an S corporation that did not have an S election in effect on that date.

Rev. Rul 2003-6

Prior to the issuance of Rev. Rul. 2003-6, the IRS came to the realization that certain arrangements involving ESOPs were being used to shelter funds from proper taxation. Typically these schemes involved ESOPs that held employer securities in an S-corporation. These arrangements were being used for the purpose of claiming eligibility for the delayed effective date of IRC § 409(p) under EGTRRA § 656(d)(2). Rev. Rul 2003-6 was designed to alert employers and their representatives that the tax benefits purportedly generated by some of these transactions are not allowable for federal income tax purposes. Additionally, Rev. Rul 2003-6 also alerts employers, their representatives, and organizers or sellers of these transactions to certain responsibilities that may arise from participating in these transactions.

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Prohibited allocations of stock in an S-Corp. ESOP, Continued

Rev. Rul 2003-6 (continued)

According to Rev. Rul 2003-6, an S-Corp. ESOP, as described in the ruling, is not eligible for the delayed effective date under IRC § 409(p) as provided for under EGTRRA § 656(d)(2). As a result, such an ESOP would be subject to the nonallocation rules of IRC § 409(p) effective for plan years ending after March 14, 2001. Any taxpayer who is a disqualified person with respect to the S-Corp. ESOP is treated as receiving a deemed distribution of stock allocated to the taxpayer's account and income with respect to that account. In addition, excise taxes under IRC § 4979A apply to any nonallocation year.

26 CFR 1.409(p)-1T

The IRS and the Treasury Department issued 26 CFR 1.409(p)-1T to address some of these problems. This is the proposed regulation dealing with prohibited allocation of securities in an S-Corp. This regulation was issued in proposed and temporary form pending final legislation. Hearings on these new regulations have been tentatively scheduled for sometime in mid-November.

According to the temporary regulations, the effective dates, for S-Corp. ESOPs established on or before March 14, 2001 do not apply until plan years beginning on or after January 1, 2005. With respect to an ESOP established after March 14, 2001, the temporary regulations are applicable for all plan years ending after October 20, 2003.

Rev. Rul. 2004-4

In February of 2004, the IRS issued Rev. Rul 2004-4. This is yet another refinement of the rules pertaining to S-Corp. ESOPs. Rev. Rul. 2004-4 was intended to answer the question of "whether an employee stock ownership plan may be a shareholder in an S-Corp."

Within Rev. Rul. 2004-4 there exists a special transitional rule. The revenue ruling generally applies to plan years ending after October 20, 2003, but the ruling will not be effective before March 15, 2004, if

1. all interests in a QSUB held by individuals who would be disqualified persons under the revenue ruling are distributed to those individuals as compensation on or before March 15, 2004, and
2. no such individual has been a participant in the ESOP at any time after October 20, 2003, and before March 15, 2004.

Accordingly, subchapter S ESOPs which violate the provisions of Rev. Rul. 2004-4 may not be treated as violating the rules of IRC 409(p) where the distributions were timely made.

Continued on next page

Prohibited allocations of stock in an S-Corp. ESOP, Continued

Explanation of provisions

All of these provisions have been enacted with an eye towards tightening some of the loop holes that existed in the Internal Revenue Code and the Treasury Regulations pertaining to ESOPs, particularly those of S-Corps.

The proposed and temporary regulations along with all of the revenue rulings and notices are designed to stop transactions that move business profits of S Corporations away from ESOP. They are designed so that rank-and-file employees, not just highly-compensated employees or owners, benefit from these arrangements.

One of the side effects is that the rulings prohibit using stock options on a subsidiary to drain value out of the ESOP for the benefit of the S-Corp. former owners or key employees.

Notice 2002-2, Q&A-15, provides that an S-Corp. does not have an election in effect on March 14, 2001, unless a valid election was actually filed on or before that date and is effective with respect to such corporation on or before that date.

If there is an nonallocation year with respect to an ESOP maintained by an S corporation:

1. the amount allocated in a prohibited allocation to an individual who is a disqualified person is treated as distributed to such individual (i.e., the value of the prohibited allocation is includible in the gross income of the individual receiving the prohibited allocation);

2. an excise tax is imposed on the S corporation equal to 50 percent of the amount involved in a prohibited allocation; and

3. an excise tax is imposed on the S corporation with respect to any equity owned by a disqualified person.

It is intended that the provision will greatly limit the establishment of ESOP's by S corporations to those that provide broad-based employee coverage and that benefit rank-and-file employees as well as highly compensated employees and historical owners.

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Prohibited allocations of stock in an S-Corp. ESOP, Continued

What this means for EGTRRA

Most of the issues peculiar to ESOPs are operational. As far as examining plans for EGTRRA, the agent should be aware that this is a fairly involved topic. Due to the nature of the changes, and the level of complexity involved, it would be easy for not only the agents to miss some crucial point, but also for the submitting practitioner to miss similar if not other points as well

The determination specialists reviewing plans will in all likelihood see plan amendments in the form of good faith EGTRRA amendments. As stated, this area is full of changes and the amendments submitted must be carefully scrutinized with an understanding that there is a plethora of guidance currently issued. Pending hearings, there is potentially more guidance forthcoming.

When reviewing submitted plan documents, agents should make sure to review controlled group/affiliated service group information and, if a ruling on coverage is requested, question coverage information to determine if the highly compensated employees are correctly identified. Any good faith EGTRRA amendments should be reviewed keeping in mind the effective date of IRC 409(p). If the later effective date is used for IRC 409(p), the specialist should question the representative or sponsor as to why that date was chosen. If a specialist suspects possible manipulation of the effective date for purposes of IRC 409(p) or avoidance of the rules of that section, a referral to examination or the abusive tax shelter committee may be warranted.

The Form 5310 of a terminating subchapter S ESOP should be scrutinized carefully. Depending on the issues developed, a referral to examination or the abusive tax shelter committee may be warranted.

References

Rev. Rul. 2004-4, Rev. Rul. 2003-6, Notice 2002-2, IRC §§ 409(p), 4975(e)(7), and 4979A. EGTRRA § 656, Treas. Reg. § 1.409(p)-1T

Loans for Small Businesses

Introduction

– EGTRRA § 612,

– Amendment is required for plans that provide loans to participants but which prohibit the making of loans to owner-employees or Subchapter S shareholder employees. If the plan does not have such provision the language is optional,

– Effective Date: Years beginning after December 31, 2001.

Pre EGTRRA

Owners of businesses who were self employed were not allowed to borrow from the plans that they belonged to.

Post EGTRRA

Subchapter S shareholders, partners in partnerships, LLCs, or sole proprietors may now take plan loans.

Explanation of provision

Statutory exemption to a prohibited transaction for loans between a party in interest and a plan now also applies to loans between a plan and a shareholder employee or owner-employee.

Practitioners Note

Plan administrators have welcomed this change. The new rules permit sole proprietors, partners and other small business shareholders to take loans from their company pension plans. It removes one of the distinctions between Keogh plans and other plans. **This amendment also applies to outstanding loans**. Look for numerous plans to make this amendment. In the past, small business owners took out loans without realizing that those loans were illegal. Now, especially with terminating plans, this will become an important change in that it allows for past potentially disqualifying loans to be made good.

References

Notice 2001-57, IRC § 4975(f)(6) and EGTRRA § 612(a).

Treatment of Self Employment Income of Members of Certain Religious Faiths

Introduction

– EGTRRA § 611(g)

– Amendment is optional

– Effective Date: Taxable years beginning after December 31, 2001.

Explanation of provision

The provision amends the definition of compensation for purposes of all qualified plans and IRA's (including SIMPLE arrangements) to include an individual's net earnings that would be subject to self-employment taxes (SECA) but for the fact that the individual is covered by a religious exemption.

References

IRC §§ 401(c)(2), 408(p)(6)(A), and EGTRRA § 611(g).

Option to Treat Elective Deferrals as After Tax Contributions

Introduction

– EGTRRA § 611(g),

– Amendment is optional,

– Effective Date: Taxable years beginning after December 31, 2005

Post EGTRRA

Starting in 2006,employees of participating employers will be able to invest in what amounts to a Roth 401(k). While the employees will not get a tax deduction on the money that's contributed, the funds will grow and can be withdrawn tax-free. Those funds will also be eligible for employer matching contributions. Upon retirement, employees will be able to roll over the funds into a traditional Roth IRA.

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Explanation of provision

Employees may designate some elective contributions as after-tax contribution or "Roth contributions." These contributions decrease a participant's elective contributions and are subject to special distribution rules, similar to those of Roth IRAs. Distributions attributable to these contributions are not included in the employee's gross income, if the distribution is not made prior to the 5 year period beginning on the date the contribution was made or if made on account of the employee becoming disabled, the attainment of 59 ½ or the estate of the deceased participant. These contributions can only be rolled over into another similar arrangement or to a Roth IRA.

Practitioners Note

For employers, Roth 401(k)'s will require separate book keeping and increased administrative costs. In order for employees to accrue and withdraw funds tax-free, they must leave the money in the trust for at least five years without taking any distributions. Look for plan provisions that address these issues.

References

IRC § 402A and EGTRRA § 617.

Small Business Tax Credit for New Retirement Plan Expenses

Introduction

– EGTRRA § 619,

– Amendment is optional,

– Effective Date: The credit is effective with respect to costs paid or incurred in taxable years beginning after December 31, 2001, with respect to plans established after such date.

Post EGTRRA

Small employers that first establish a retirement plan can receive a tax credit of up to $500 per year for the first three years of the plan costs.

Explanation of provision

Small employers, those with fewer than 100 employees who received at least $5,000 in compensation from the employer for the preceding plan year, receive a 50% credit for implementation expenses incurred up to $500. The remainders of the expenses are deductible up to the applicable limitations.

This change was specifically designed to ease the administrative burdens on newly established plans for small employers.

Practitioners Note

Look for newly established plans to incorporate language that allows for this deduction. **Established plans should not be making this amendment since the deductions only apply to plans initially established and with effective dates after December 31, 2001**.

References

IRC §§ 38(b), 45E and EGTRRA § 619.

Equitable Treatment for Contributions of Employees to Defined Contribution Plans (Tax-Sheltered Annuities)

Introduction

– Amendment is required,

– Effective Date: Years beginning after December 31, 2001.

Pre-EGTRRA

For 2001, IRC § 457(b) plans limit the additions to an employees account to the lesser of $8,500 or 33 ⅓% of includable compensation. Amounts that the employee contributes under either an IRC § 401(k) or 403(b) plan will count against this limit.

Post EGTRRA

The limit is now increased to the lesser of 100% of compensation, or a higher dollar amount as referenced below.

Explanation of provision

The provision repeals the exclusion allowance applicable to contributions to tax-sheltered annuities. Thus, such annuities are now subject to the same limits applicable to tax-qualified plans.

The provision also directs the Secretary of the Treasury to revise the regulations relating to the exclusion allowance under IRC § 403(b)(2) to render void the requirement that contributions to a defined benefit plan be treated as previously excluded amounts for purposes of the exclusion allowance, for taxable years beginning after December 31, 1999 and prior to January 1, 2002.

References

IRC § 403(b) and EGTRRA § 632.

Equitable Treatment for Contributions of Employees to Defined Contribution Plans (IRC § 457 Plans)

Introduction

– EGTRRA § 632,

– Amendment is required,

– Effective Date: Years beginning after December 31, 2001.

Pre EGTRRA

IRC § 457(b) plans limit the additions to an employees account to the lesser of 33⅓% of includible income or $8,500 (2001 plan year limit). Amounts contributed by the employee to a 401(k) or 403(b) plan to which they belong counted against this limit.

Post EGTRRA

The limit is now increased to the lesser of 100% of compensation, or a higher dollar amount as referenced below.

Explanation of provision

The limit that now applies is the lesser of 100% of compensation or:

– 2003 - $12,000
– 2004 - $13,000
– 2005 - $14,000
– 2006 - $15,000
– beyond 2006 the limit will be adjusted for inflation accordingly.

Additionally, amounts contributed under a 401(k) or a 403(b) plan no longer count against the 457 limit.

Practitioners Note

With the new limit, an employee might be able to contribute fully to a 401(k) plan and a 457 plan if they belong to both. Look for plan language that references the removal of the limitation in older plans. The 457 limit applies to both employee and employer contributions and 457 contributions are not subject to nondiscrimination testing. Look for language along these lines.

References

IRC § 457 and EGTRRA § 632(c)

Repeal of Coordination Requirements for Deferred Compensation Plans of State and Local Governments and Tax-Exempt Organizations

Introduction

– Amendment is optional

– Effective Date: Years beginning after December 31, 2001.

Explanation of provision

Elective deferrals are no longer required to be coordinated with other pre-tax contributions for purposes of complying with pre-tax limit applicable to IRC § 457 plans. This rule would apply if an employee participates in an IRC § 457 plan and tax-qualified plan during the same taxable year.

Practitioners Note

The repeal of the coordination limits may mark a rise in the use of IRC § 457 plans. This repeal will make these plans more attractive for eligible employers and it could give employers more design options.

Tax-exempt or governmental sponsors that are eligible to maintain either an IRC § 401(k), 457(b) and/or 403(b) plan may consider maintaining an IRC § 457(b) along with one of these other plans at the same time due to the benefits available in doing so.

Although EGTRRA repeals the coordination requirements for defined contribution plans of state, government and tax exempt organizations, EGTRRA does not eliminate the coordination requirements between IRC §§ 401(k) and 403(b) plans.

References

IRC § 457(c) and EGTRRA § 615.

Waiver of 60 Day Rule

Introduction

– EGTRRA § 644,

– Amendment is optional,

– Effective Date: Distributions made after December 31, 2001.

Pre-EGTRRA

Rollovers must be made within 60 days or they will be considered and treated as a taxable distribution.

Post-EGTRRA

The 60 day rollover period can be waived if the rollover cannot occur with that period of time due to disaster, events beyond the control of the participant, or if failure to permit the rollover after the 60day period would not be in good conscience.

Practitioners Note

This is not an automatic extension. In order to apply, the circumstances surrounding the extension must first be weighed. All this provision does is grant the IRS the authority to extend the 60-day limit if circumstances are appropriate.

References

IRC §§ 402(c)(3), 408(d)(3) and EGTRRA § 644(a) & (b).

Treatment of Forms of Distribution

Introduction

– Amendment is optional,
– Effective Date: Years beginning after December 31, 2001.

Pre-EGTRRA

Under the anti-cutback rules when a participants benefits are transferred from one plan to another, the transferee must preserve all forms of distribution that were previously available to the participant under the prior plan.

Post-EGTRRA

An **employee** may elect to transfer benefits from one plan to another without requiring the transferee plan to preserve the optional form of benefit subject to limits outlined below.

Explanation of provision

A transferee plan of defined contribution plan assets will not be treated as failing to comply with IRC § 411(d)(6), even if all the forms of distribution are not available under the transferee plan, if the following requirements are satisfied:

1. the transfer was a direct transfer;
2. the transfer is permitted under the terms of both plans;
3. the participant makes a voluntary election to transfer after receiving proper notice of the elimination of certain forms of benefit under the transferee plan; and
4. the participant has the option of a single sum distribution from the transferee plan.

DC Plans

Except to the extent as provided in the Regulations, a form of distribution in a DC plan may be eliminated and the plan is not treated as reducing a benefit if:

1. the plan eliminates a benefit formerly available under the other plan;
2. a single lump sum distribution is available at the same time as the distribution permitted by the amendment; and
3. such single lump sum distribution is the same as or greater than that available prior to the amendment.

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Treatment of Forms of Distribution, Continued

DB Plans

The Treasury Department was directed to issue regulations allowing the elimination of optional forms of benefits and early retirement subsidies. Elimination of such benefits under DB plans are to only be allowed provided such elimination does not adversely affect the rights of any participant in more than a *de minimus* manner.

Practitioners Note

Look for most, if not all plans to make this amendment even if they are not eliminating a form of distribution. They will want the right to do so in future years should it become necessary to do so. The Pre-EGTRRA rules often meant that profit sharing plans and 401(k)s were stuck with annuities and other forms where they did not need them. By relaxing this rule, plan administration will become easier as well as resulting in the reduction of some plan confusion. Plans not subject to the joint and survivor rules may now eliminate them without fear of an IRC § 411(d)(6) violation.

References

IRC § 411(d)(6)(D) and EGTRRA § 645(a) & (b).

Phase in Repeal of 150 Percent of Current Liability Funding Limit

Introduction

– EGTRRA § 651,

– Amendment is optional,

– Effective Date**:** Plan years beginning after December 31, 2001.

Pre-EGTRRA

Contributions to a Defined Benefit plan that exceed 150% (as indexed) of the current funding liability limit are not tax deductible.

Post-EGTRRA

This limit is increased to 170% in 2003. For plan years beginning after December 31, 2003, this limit will be completely revealed.

Explanation of provision

The provision gradually increases and then repeals the current liability full funding limit. The current liability full funding limit is 165 percent of current liability for plan years beginning in 2002 and 170 percent for plan years beginning in 2003. The current liability full funding limit is repealed for plan years beginning in 2004 and thereafter. Thus, in 2004 and thereafter, the full funding limit is the excess, if any, of (1) the accrued liability under the plan (including normal cost), over (2) the value of the plan's assets.

Practitioner Note

For Professional service employers with less than 25 employees, (e.g., doctors, lawyers, etc) funding up to the unfunded current liability limit is not available. Terminating plans are permitted to fund up to the level necessary to meet the Title IV requirements under ERISA.

References

IRC § 412(c)(7) and EGTRRA § 651.

Modification of Timing of Plan Valuations

Introduction

– EGTRRA § 661,

– Amendment is required,

– Effective Date: Plan years beginning after December 31, 2001.

Pre-EGTRRA

The plan valuation date for most plans must generally be a date within the plan year

Post-EGTRRA

Plans, especially defined benefit plans, will be allowed to use a valuation date that can be up to one year prior to the beginning of the plan year. As far as availability, this will only be allowed for plans that are currently fully funded

Explanation of provision

The provision incorporates into the statute the proposed regulation regarding the date of valuations. The provision also provides, as an exception to this general rule, that the valuation date with respect to a plan year may be any date within the immediately preceding plan year if, as of such date, plan assets are not less than 125 percent of the plan's current liability.

Information determined as of such date is required to be adjusted actuarially, in accordance with the Treasury regulations, to reflect significant differences in plan participants. An election to use a prior plan year valuation date, once made, may only be revoked with the consent of the Secretary.

Practitioners Note

Since this is a required amendment, look for plans, especially defined benefit plans, to incorporate language that allows for the prior year valuation of the plan.

References

IRC § 412, EGTRRA § 661.

Individual Retirement Arrangements (IRAs)

Introduction

– EGTRRA § 601,

– Amendment is optional,

– Effective Date: Generally effective for taxable years beginning after December 31, 2001.

Pre-EGTRRA

Currently, IRA contributions are limited to $2,000 without any indexing for inflation. There are no additional contributions allowed for older employees (*catch-up* contributions). Plans cannot allow employee IRA contributions as part of an employee sponsored employee benefit plan.

Post-EGTRRA

IRA contributions are now indexed for the 2004 plan year to $3,000. Thereafter, the limit is indexed for inflation through the 2008 plan year. Additionally, employees over the age 50 are allowed to make additional contributions to their accounts. Qualified plans, including IRC § 403(b) plans, are permitted to allow IRA contributions by eligible employees as an add-on to the employee sponsored retirement plan.

Explanation of provision

This provision increases the maximum annual dollar contribution limit for IRA contributions from $2,000 to $3,000 for 2002 through 2004, $4,000 for 2005 through and 2007 and $5000 for 2008 and thereafter. After 2008, the limit is adjusted annually for inflation in $500 increments.

Individuals who have attained age 50 may make additional catch-up IRA contributions. The otherwise maximum contribution limit (before application of the AGI phase-out limits) for an individual who has attained age 50 before the end of the taxable year is increased by $500 for 2002 through 2005 and $1,000 for 2006 and thereafter.

Practitioners Note

Most plans will probably make this change. Look for plan language that adopts the rules relating to catch-up contribution especially when sidecar IRAs are involved.

References

IRC §§ 219, 408 and EGTRRA § 601

Individual Retirement Arrangements (deemed IRAs)

Introduction

– EGTRRA § 602,

– Amendment is optional,

– Effective Date: Plan years beginning after December 31, 2002.

Pre-EGTRRA

Plans cannot allow employee IRA contributions as part of an employee sponsored employee benefit plan.

Post-EGTRRA

For plan years beginning after December 31, 2002 a qualified plan, including IRC § 403(b) plans, is permitted to allow employees to make voluntary employee contributions to a separate account designated as an IRA.

Explanation of provision

If an eligible retirement plan permits employees to make voluntary employee contributions to a separate account or annuity that;

1. is established under the plan, and
2. meets the requirements applicable to either traditional IRAs or Roth IRAs;

then a separate account or annuity is deemed a traditional IRA or a Roth IRA, as applicable, for all purposes of the Code. For example, the reporting requirements applicable to IRAs apply.

The deemed IRA, and contributions thereto, are not subject to the Code rules pertaining to the eligible retirement plan. In addition, the deemed IRA, and contributions thereto, are not taken into account in applying such rules to any other contributions under the plan.

The deemed IRA, and contributions thereto, are subject to the exclusive benefit and fiduciary rules of ERISA to the extent otherwise applicable to the plan, and under IRC408, but may not be subject to all the ERISA reporting and disclosure, participation, vesting, funding, and enforcement requirements applicable to the eligible retirement plan.

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Individual Retirement Arrangements (deemed IRAs), Continued

Explanation of provision (continued)

In 2003, for example, a 401(k) participant using a deemed IRA arrangement will have the potential to contribute as much as $15,000 ($12,000 in pre-tax 401(k) contributions plus $3,000 in deemed IRA, either tradition or Roth, contributions).

The distribution rules for deemed IRAs are the same as the rules for Traditional and Roth IRAs.

For investment purposes, the assets of the 401(k) and any deemed IRA can be commingled. Deemed IRA contributions and earnings however must be accounted for separately.

An eligible retirement plan is a qualified plan (IRC § 401(a)), tax- sheltered annuity (IRC § 403(b)), or governmental (IRC § 457) plan.

Practitioners Note

Deemed IRAs are going to be a welcome addition to most plans. The Deemed IRA can be used by most plans and most employees who are eligible to use them probably will. Look for plan language and amendments that incorporate deemed IRAs. Be careful to check that the separate accounting requirements are part of any such amendment.

References

Rev. Proc. 2003-13, IRC § 408 and EGTRRA § 602.

IRC § 401(a)(9) – Minimum Distribution Requirements

Introduction

– Amendment is required,

– Effective Date: For determining required minimum distributions for calendar ***years beginning after December 31, 2002,***

– EGTRRA § 634.

Pre-EGTRRA

IRC § 401(a)(9) requires certain minimum distributions from retirement plans starting at the later of age 70½ or the retirement of the participant, so long as the participant is not a 5% owner. IRAs are also exempt from the ability to defer past age 70½.

Post-EGTRRA

Section 634 of EGTRRA instructed the Secretary of Treasury to modify the life expectancy tables used for purposes of the minimum distribution rules to reflect current life expectancy. In accordance with that instruction, the final regulations adopt new tables of life expectancies to be used for determining required minimum distributions.

Explanation of Provision

All that EGTRRA § 634 provides is that the Secretary of the Treasury shall modify the life expectancy tables under the regulations relating to minimum distribution requirements under IRC §§ 401(a)(9), 408(a)(6) and (b)(3), 403(b)(10), and 457(d)(2) to reflect current life expectancy.

The regulation enacted under 26 C.F.R. 1.401(a)(9)-1 et seq., are intended to be the final regulations relating to required minimum distributions from qualified plans, individual retirement plans, deferred compensation plans under IRC §§ 457, and 403(b) annuity contracts, custodial accounts, and retirement income accounts.

These regulations are intended provide the public with guidance necessary to comply with the law and will affect administrators of, participants in, and beneficiaries of qualified plans, institutions that sponsor and individuals who administer individual retirement plans, individuals who use individual retirement plans for retirement income, and beneficiaries of individual retirement plans, and employees for whom amounts are contributed to section 403(b) annuity contracts, custodial accounts, or retirement income accounts and beneficiaries of such contracts and accounts.

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IRC § 401(a)(9) – Minimum Distribution Requirements,
Continued

How EGTRRA § 634 was fulfilled

In order to achieve the mandate of EGTRRA § 634, the Treasury has enacted a series of revenue procedures and revenue rulings that, when taken as a whole, provide guidance for the implementation of the final IRC § 401(a)(9) regulations adopted April 17, 2002.

Rev. Proc. 2002-29

Rev. Proc. 2002-29 provides that qualified retirement plans must generally be amended by the end of the first plan year beginning on or after January 1, 2003. The revenue procedure contains model plan amendments that sponsors of master and prototype (M&P), volume submitter and individually designed plans may adopt to satisfy this requirement, copies of which are provided later in this section. The revenue procedure also provides that determination letter applications filed on or after the first day of the 2003 plan year will be reviewed with respect to whether the form of the plan satisfies the requirements of the final and temporary regulations under IRC § 401(a)(9).

Proposed regulations under § 401(a)(9) were published on July 27, 1987, and January 17, 2001. The proposed regulations published in 2001 simplified many of the rules that had been proposed in the 1987 regulations and also incorporated other guidance published after 1987, including guidance relating to the changes to IRC § 401(a)(9) made by the Small Business Job Protection Act of 1996 (SBJPA).

In order for a qualified plan to use either the original model amendment in Announcement 2001-18 or the alternative model amendment in Announcement 2001-82, the plan sponsor was required to adopt the amendment by the deadline for amending its plan for GUST.

Final and temporary regulations under IRC § 401(a)(9) were published in the Federal Register on April 17, 2002. The Final and Temporary Regulations generally adopt the simplifications proposed in 2001 and provide additional simplifications. The IRC § 401(a)(9) Final and Temporary regulations apply for determining required minimum distributions for calendar years beginning on or after January 1, 2003. For determining required minimum distributions for calendar year 2002, taxpayers may rely on the IRC § 401(a)(9) Final and Temporary Regulations, the IRC § 401(a)(9) 2001 Proposed Regulations, or the IRC § 401(a)(9) 1987 Proposed Regulations.

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IRC § 401(a)(9) – Minimum Distribution Requirements,
Continued

Rev. Proc. 2003-10

Rev. Proc. 2003-10 modifies Rev. Proc. 2002-29 in that it postpones the time by which **qualified defined benefit** plans must be amended to comply with final and temporary regulations under IRC § 401(a)(9).

Rev. Proc. 2003-10 delays the time for DB plan adoption until the end of the EGTRRA remedial amendment period which was published in the Federal Register on April 17, 2002. The revenue procedure further provides that until further notice, determination letters for defined benefit plans will not take into account the requirements of these regulations. These changes are being made in conjunction with Notice 2003-2.

This postponement does not apply to the time for amending defined contribution plans to comply with the requirements of the IRC § 401(a)(9) Final and Temporary Regulations. Such a postponement is unnecessary because § 1.401(a)(9)-6T applies to a defined contribution plan only if the plan distributes benefits by purchasing an annuity contract.

Similarly, the postponement does not apply to the time by which IRAs, SEPs and SIMPLE IRA plans must be amended to comply with the requirements of the IRC § 401(a)(9) Final and Temporary Regulations and submitted for new opinion letters.

1.401(a)(9)-6T

Along with the final regulations issued, Treas. Reg. § 1.401(a)(9)-6T was issued as a temporary regulation. One of the main reasons that this was done was to provide a number of changes to the annuity rules as provided in the 2001 proposed regulations. Note that Rev. Proc. 2003-10 provides that qualified defined benefit plans **do not have to be amended until the end of the EGTRRA remedial amendment period**. The remedial amendment period under IRC § 401(b) for a disqualifying provision ends on the last day of the first plan year beginning on or after January 1, 2005.

Some of the changes include changes designed to make the rules more consistent with the rules for individual accounts. In order to allow practitioners to comment on these changes, the regulations governing defined benefit plans were issued as temporary and proposed regulations rather than as final regulations.

IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 1 – Defined Contribution Plans

Section 1: General Rules

1.1. Effective Date. Unless an earlier effective date is specified in the adoption agreement, the provisions of this article will apply for purposes of determining required minimum distributions for calendar years beginning with the 2003 calendar year.

1.2. Coordination with Minimum Distribution Requirements Previously in Effect: If the adoption agreement specifies an effective date of this article that is earlier than calendar years beginning with the 2003 calendar year, the required minimum distributions for 2002 under this article will be determined as follows:

- If the total amount of the 2002 required minimum distributions under the plan made to the distributee prior to the effective date of this article, ***(determined under the 1987 Income Tax Regulations),*** equals or exceeds the required minimum distributions determined under this article, ***(determined under the 2002 Final and Temporary Income Tax Regulations),*** then no additional distributions will be required to be made for 2002 on or after such date to the distributee.

- If the total amount of 2002 required minimum distributions under the plan made to the distributee prior to the effective date of this article is less than the amount determined under this article, then required minimum distributions for 2002 on and after such date will be determined so that the total amount of required minimum distributions for 2002 made to the distributee will be the amount determined under this article.

1.3. Precedence. The requirements of this article will take precedence over any inconsistent provisions of the plan.

1.4. Requirements of Treasury Regulations Incorporated. All distributions required under this article will be determined and made in accordance with the Treasury regulations under IRC § 401(a)(9).

1.5. TEFRA Section 242(b)(2) Elections. Notwithstanding the other provisions of this article, distributions may be made under a designation made before January 1, 1984, in accordance with section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act (TEFRA) and the provisions of the plan that relate to section 242(b)(2) of TEFRA.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 1 – Defined Contribution Plans, Continued

Section 2: Time and Manner of Distribution

2.1. Required Beginning Date. The participant's entire interest will be distributed, or begin to be distributed, to the participant no later than the participant's required beginning date.

2.2. Death of Participant Before Distribution begins. If the participant dies before distributions begin, the participant's entire interest will be distributed, or begin to be distributed, no later than as follows:

(a) If the participant's surviving spouse in the participant's sole designated beneficiary, then, except as provided in the adoption agreement, distributions to the surviving spouse will begin by December 31 of the calendar year immediately following the calendar year in which the participant died, or by December 31 of the calendar year in which the participant would have attained age 70½, if later

(b) If the participant's surviving spouse is not the participant's sole designated beneficiary, then, except as provided in the adoption agreement, distributions to the designated beneficiary will begin by December 31, of the calendar year immediately following the calendar year in which the participant died.

(c) If there is no designated beneficiary as of September 30 of the year following the year of the participant's death, the participant's entire interest will be distributed by December 31 of the calendar year containing the fifth anniversary of the participant's death.

(d) If the participant's surviving spouse is the participant's sole designated beneficiary and the surviving spouse dies after the participant but before distributions to the surviving spouse begin, this section 2.2, other than section 2.2(a), will apply as if the surviving spouse were the participant.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 1 – Defined Contribution Plans, Continued

Time and Manner of Distribution (continued)

For purposes of this section 2.2 and section 4, unless section 2,2(d) applies, distributions are considered to begin on the participant's required beginning date. If section 2.2(d) applies, distributions are considered to begin on the date of distributions are required to begin to the surviving spouse under section 2.2(a). If distributions under any annuity purchased from an insurance company irrevocably commence to the participant before the participant's required beginning date (or to the participant's surviving spouse before the date distributions are required to begin to the surviving spouse under section 2.2(a)), the date distributions are considered to begin is the date distributions actually commence.

2.3. Forms of Distribution. Unless the participant's interest is distributed in the form of an annuity purchased from an insurance company or in a single sum on or before the required beginning date, as of the first distribution calendar year distributions will be made in accordance with sections 3 and 4 of this article. If the participant's interest is distributed in the form of an annuity purchased from an insurance company, distributions there under will be made in accordance with the requirements of IRC § 401(a)(9) and the Treasury regulations.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 1 – Defined Contribution Plans, Continued

Section 3: Required Minimum Distributions During Lifetime

3.1. Amount of Required Minimum Distribution For Each Distribution Calendar Year. During the participant's lifetime, the minimum amount that will be distributed for each distribution calendar year is the lesser of:

(a) the quotient obtained by dividing the participant's account balance by the distribution period in the Uniform Lifetime Table set forth in Treas. Reg. § 1.410(a)(9)-9, using the participant's age as of the participant's birthday in the distribution calendar year, or

(b) if the participant's sole designated beneficiary for the distribution calendar year is the participant's spouse, the quotient obtained by dividing the participant's account balance by the number in the Joint and Last Survivor Table set forth in Treas. Reg. § 1.401(a)(9)-9, using the participant's and spouse's attained ages as of the participant's and spouse's birthdays in the distribution calendar year.

3.2. Lifetime Required Minimum Distributions continue through year of Participant's Death. Required minimum distributions will be determined under this section 3 beginning with the first distribution calendar year and up to and including the distribution calendar year that includes the participant's date of death.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 1 – Defined Contribution Plans, Continued

Section 4: Required Distributions After Death

4.1. Death on or After Date Distributions Begin.

(a) Participant's Survived by a Designated Beneficiary. If the participant dies on or after the date distributions begin and there is a designated beneficiary, the minimum amount that will be distributed for each distribution calendar year after the year of the participant's death is the quotient obtained by dividing the participant's account balance by the longer of the remaining life expectancy of the participant or the remaining life expectancy of the participant's designated beneficiary, determined as follow:

(1) The participant's remaining life expectancy is calculated ***(from the tables under the Income Tax Regulations),*** using the age of the participant in the year of death, reduced by one for each subsequent year.

(2) If the participant's surviving spouse is the participant's sole designated beneficiary, the remaining life expectancy of the surviving spouse is calculated for each distribution calendar year after the year of the participant's death using the surviving spouse's age as of the spouse's birthday in that year. For distribution calendar years after the year of the surviving spouse's death, the remaining life expectancy of the surviving spouse is calculated, ***(using the tables under the Income Tax Regulations), and*** using the age of the surviving spouse as of the spouse's birthday in the calendar year of the spouse's death, reduced by one for each subsequent calendar year.

(3) If the participant's surviving spouse is not the participant's sole designated beneficiary, the designated beneficiary's remaining life expectancy is calculated***, (using the tables under the Income Tax Regulations), and using*** the age of the beneficiary in the year following the year of the participant's death, reduced by one for each subsequent year.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 1 – Defined Contribution Plans, Continued

Required Distributions After Death (continued)

(b) No Designated Beneficiary. If the participant dies on or after the date distributions begin and there is no designated beneficiary as of September 30 of the year after the year of the participant's death, the minimum amount that will be distributed for each distribution calendar year after the year of the participant's death is the quotient obtained by dividing the participant's account balance by the participant's remaining life expectancy calculated, ***(using the tables under the Income Tax Regulations), and*** using the age of the participant in the year of death, reduced by one for each subsequent year.

4.2. Death before Date Distributions Begin

(a) Participant Survived by Designated Beneficiary. Except as provided in the adoption agreement, if the participant dies before the date distributions begin and there is a designated beneficiary, the minimum amount that will be distributed for each distribution calendar year after the year of the participant's death is the quotient obtained by dividing the participant's account balance by the remaining life expectancy of the participant's designated beneficiary, determined as provided in section 4.1.

(b) No Designated Beneficiary. If the participant dies before the date distributions begin and there is no designated beneficiary as of September 30 of the year following the year of the participant's death, distribution of the participant's entire interest will be completed by December 31 of the calendar year containing the fifth anniversary of the participant's death.

(c) Death of Surviving Spouse Before Distributions to Surviving Spouse Are Required to Begin. If the participant dies before the date distributions begin, the participant's surviving spouse is the participant's sole designated beneficiary, and the surviving spouse dies before distributions are required to begin to the surviving spouse under section 2.2(a), this section 4.2 will apply as if the surviving spouse were the participant.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 1 – Defined Contribution Plans, Continued

Section 5: Definitions

5.1 Designated Beneficiary. The individual who is designated as the beneficiary under section ____ of the plan and is the designated beneficiary under IRC § 401(a)(9) and Treas. Reg. § 1.401(a)(9)-1, Q&A-4.

5.2 Distribution calendar year. A calendar year for which a minimum distribution is required. For distributions beginning before the participant's death, the first distribution calendar year is the calendar year immediately preceding the calendar year, which contains the participant's required beginning date. For distributions beginning after the participant's death, the first distribution calendar year is the calendar year in which distributions are required to begin under section 2.2. The required minimum distribution for the participant's first distribution calendar year will be made on or before the participant's required beginning date. The required minimum distribution for other distribution calendar years, including the required minimum distribution for the distribution calendar year in which the participant's required beginning date occurs, will be made on or before December 31 of that distribution calendar year.

5.3 Life expectancy. Life expectancy as computed by use of the Single Life Table in Treas. Reg. § 1.401(a)(9)-9.

5.4 Participant's account balance. The account balance as of the last valuation date in the calendar year immediately preceding the distribution calendar year (valuation calendar year) increased by the amount of any contributions made and allocated or forfeitures allocated to the account balance as of the dates in the valuation calendar year after the valuation date and decreased by distributions made in the valuation calendar year after the valuation date. The account balance for the valuation calendar year includes any amounts rolled over or transferred to the plan either in the valuation calendar year or in the distribution calendar year if distributed or transferred in the valuation calendar year.

5.5 Required Beginning date. The date specified in section ___ of the plan.

IRC § 401(a)(9) – Rev. Proc. 2002-29 Sample Adoption Agreement – Defined Contribution Plans

Adoption Agreement-Introductory Language

(Check and complete section 1 below if any required minimum distributions for the 2002 distribution calendar year were made in accordance with the IRC § 401(a)(9) Final and Temporary Regulations.)

Section 1: Effective Date of Plan Amendment

Article ___, Minimum Distribution Requirements, applies for purposes of determining required minimum distributions for distribution calendar year s beginning with the 2003 distribution calendar year as well as required minimum distributions for the 2002 distribution calendar year that are made on or after ____.

(Check and complete any of the remaining sections if you wish to modify the rules in sections 2.2 and 4.2 of Article___ of the plan.)

Section 2: Election to Apply 5-Year Rule to Designated Beneficiaries

If the participant dies before distributions begin and there is a designated beneficiary, distribution to the designated beneficiary is not required to begin by the date specified in the section 2.2 of Article ___ of the plan, but the participant 's interest must be distributed to the designated beneficiary by December 31 of the calendar year containing the fifth anniversary of the participant's death. If the participant's surviving spouse is the participant's sole designated beneficiary and the surviving spouse dies after the participant but before distributions to either the participant or the surviving spouse begin, this election will apply as if the surviving spouse were the participant.

This election will apply to (Check one):

____ All distributions.

____ The following distributions: _____.

Continued on next page

IRC § 401(a)(9) – Rev. Proc. 2002-29 Sample Adoption Agreement – Defined Contribution Plans, Continued

Section 3: Election to Allow Participants or Beneficiaries to Elect 5-Year Rule

Participants or beneficiaries may elect on an individual basis whether the 5-year rule or the life expectancy rule in sections 2.2 and 4.2 of Article ___ of the plan applies to distributions after the death of a participant who has a designated beneficiary.

The election must be made no later than the earlier of:

September 30 of the calendar year in which distribution would be required to begin under section 2.2 of Article ___ of the plan, or by

September 30 of the calendar year which contains the fifth anniversary of the participant's (or , if applicable, surviving spouse's) death.

If neither the participant nor beneficiary makes an election under this paragraph, distributions will be made in accordance with sections 2.2 and 4.2 of Article ___ of the plan, if applicable, the elections in section 2 above.

Section 4: Election to Allow Designated Beneficiary to Elect 5-year Rule

A designated beneficiary who is receiving payments under the 5-year rule may make a new election to receive payments under the life expectancy rule until December 31, 2003, provided that all amounts that would have been required to be distributed under the life expectancy rule for all distribution calendar years before 2004 are distributed by the earlier of December 31, 2003 or the end of the 5-year period.

IRC Section 401(a)(9)-Defined Benefit Plans

Introduction

Effective Date: The final and temporary regulations apply for determining required minimum distributions for calendar years beginning on or after January 1, 2003.

Pre-EGTRRA

IRC § 401(a)(9) requires certain minimum distributions from retirement plans starting at the later of age 70½ or the retirement of the participant, so long as the participant is not a 5% owner. IRAs are also exempt from the ability to defer past age 70½. Rev. Ruling 95-6 establishes the 83 GAM blended table as the mortality table to be used for IRC §§ 415 and 417 purposes.

Post-EGTRRA

Section 634 of the Economic Growth and Tax Relief Reconciliation Act of 2001 **instructed the IRS to modify the life expectancy tables used for the purpose of determining the minimum distribution amounts**. This change was mandated to reflect extended current life expectancies. The final regulations adopted April 17, 2002 adopted new tables of life expectancies 94 Group Annuity Reserving table (94 GAR) to be used for determining required minimum distributions.

NOTE

Treas. Reg. § 1.401(a)(9)-6T, relating to Defined Benefit plans, published on April 17, 2002, is a Temporary Regulation. All other sections of the IRC § 401(a)(9) regulations published on April 17, 2002 have been finalized.

1.401(a)(9)-6T

As stated earlier, Treas. Reg. § 1.401(a)(9)-6T was issued as a temporary regulation to provide a number of changes to the annuity rules as provided in the 2001 proposed regulations. Rev. Proc. 2003-10 provides that qualified defined benefit plans do not have to be amended until the end of the EGTRRA remedial amendment period which ends on the last day of the first plan year beginning on or after January 1, 2005.

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IRC Section 401(a)(9)-Defined Benefit Plans, Continued

Explanation of Provision

Since Treas. Reg. § 1.401(a)(9)-6T has not been finalized yet, Rev. Proc. 2003-10 provides that qualified defined benefit plans do not have to be amended until the end of the EGTRRA remedial amendment period. Defined Benefit plans are not required to be amended for the IRC § 401(a)(9) **but must operate** in compliance with these rules for calendar years beginning after December 31, 2002.

Rev. Proc 2001-62 added a new group mortality table. The new mortality table, known as 94 Group Annuity Reserving table (94 GAR) was derived by projecting mortality improvement through 2003 using assumed mortality improvement factors and was the response to Congress' mandate to modify the life expectancy tables used for the purpose of determining the minimum distribution amounts. The new mortality table is based upon a fixed blend of 50% of the unloaded male mortality rates and 50% of the unloaded female mortality rates underlying the mortality rates in the 94 GAR, projected to 2002.

The new table is the applicable mortality table for purposes of adjusting benefits or limitations under IRC § 415(b)(2) and for determining the present value of plan benefits under IRC § 417(e)(3) and the corresponding provisions of ERISA. The table shows, for each age, the number living based upon a starting population of one million lives at age 1 (l[x]), and the annual rate of mortality (q[x]). The uniform lifetime table provided in the final regulations has been adjusted to reflect these new mortality tables.

Consequently, determination letter requests for individually designed Defined Benefit plans submitted after January 1, 2003, **should be reviewed to determine if the plan contains the statutory language relating to the Final and Temporary IRC § 401(a)(9) regulations**.

IRC § 401(a)(9) Amendment Resulting In A Disqualifying Provision

If a plan is amended to provide for IRC § 401(a)(9) regulations, and as a result, there is a disqualifying provision, the RAP for that disqualifying provision will end at the end of the EGTRRA RAP. Thus, a plan would not need to file for a determination letter prior to the EGTRRA RAP.

The adoption of the model amendment will provide reliance, without the need to request a letter, that the plan has been amended to comply with IRC § 401(a)(9) and will not result in a disqualifying provision.

IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 2 – Defined Benefit Plans

Section 1, General Rules

1.1. Effective Date. Unless an earlier effective date is specified in the adoption agreement, the provisions of this article will apply for purposes of determining required minimum distributions for calendar years beginning with the 2003 calendar year.

1.2. Coordination with Minimum Distribution Requirements Previously in Effect: If the adoption agreement specifies an effective date of this article that is earlier than calendar years beginning with the 2003 calendar year, required minimum distributions for 2002 under this article will be determined as follow.

- If the total amount of 2002 required minimum distributions under the plan made to the distributee prior to the effective date of this article equals or exceeds the required minimum distributions determined under this article, then no additional distributions will be required to be made for 2002 on or after such date to the distributee.

- If the total amount of 2002 required minimum distributions under the plan made to the distributee prior to the effective date of this article is less than the amount determined under this article, then required minimum distributions for 2002 on and after such date will be determined so that the total amount of required minimum distributions for 2002 made to the distributee will be the amount determined under this article.

1.3. Precedence. The requirements of this article will take precedence over any inconsistent provisions of the plan.

1.4. Requirements of Treasury Regulations Incorporated. All distributions required under this article will be determined and made in accordance with the Treasury regulations under IRC § 401(a)(9).

1.5. TEFRA Section 242(b)(2) Elections. Notwithstanding the other provisions of this article, other than section 1.4, distributions may be made under a designation made before January 1, 1984, in accordance with section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act (TEFRA) and the provisions of the plan that relate to section 242(b)(2) of TEFRA.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 2 – Defined Benefit Plans, Continued

Section 2, Time and Manner of Distributions

2.1. Required Beginning Date. The participant's entire interest will be distributed, or begin to be distributed, to the participant no later than the participant's required beginning date.

2.2. Death of Participant Before Distribution begins. If the participant dies before distributions begin, the participant's entire interest will be distributed, or begin to be distributed, no later than as follows:

a. If the participant's surviving spouse in the participant's sole designated beneficiary, then, except as provided in the adoption agreement, distributions to the surviving spouse will begin by December 31 of the calendar year immediately following the calendar year in which the participant died, or by December 31 of the calendar year in which the participant would have attained age 70½, if later.
b. If the participant's surviving spouse is not the participant's sole designated beneficiary, then, except as provided in the adoption agreement, distributions to the designated beneficiary will begin by December 31, of the calendar year immediately following the calendar year in which the participant died.
c. If there is no designated beneficiary as of September 30 of the year following the year of the participant's death, the participant 's entire interest will be distributed by December 31 of the calendar year containing the fifth anniversary of the participant's death.
d. If the participant's surviving spouse is the participant's sole designated beneficiary and the surviving spouse dies after the participant but before distributions to the surviving spouse begin, this section 2.2, other than section 2.2(a), will apply as if the surviving spouse were the participant.

For purposes of this section 2.2 and section 5, distributions are considered to begin on the participant's required beginning date (or if section 2.2(d) applies, the date distributions are required to begin to the surviving spouse under section 2.2(a)). If distributions from an annuity purchased from an insurance company irrevocably commence to the participant before the participant's required beginning date (or to the participant's surviving spouse before the date distributions are required to begin to the surviving spouse under section 2.2(a)), the date distributions are considered to begin is the date distributions actually commence.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 2 – Defined Benefit Plans, Continued

Section 2, Time and Manner of Distributions (continued)

2.3. Forms of Distribution. Unless the participant's interest is distributed in the form of an annuity purchased from an insurance company or in a single sum on or before the required beginning date, as of the first distribution calendar year distributions will be made in accordance with sections 3, 4 and 5 of this article.

If the participant's interest is distributed in the form of an annuity purchased from an insurance company, distributions there under will be made in accordance with the requirements of IRC § 401(a)(9) and the Treasury regulations.

Any part of the participant's interest which is in the form of an individual account described in IRC § 414(k) will be distributed in a manner satisfying the requirements of IRC § 401(a)(9) and the Treasury regulations that apply to individual accounts.

Section 3, Determination of Amount to be Distributed Each Year

3.1. General Annuity Requirements. If the participant's interest is paid in the form of annuity distributions, under the plan, payments under the annuity will satisfy the following requirements:

a. the annuity distributions will be paid in periodic payments made at intervals not longer than one year;

b. the distribution period will be over a life (or lives) or over a period certain not longer than the period described in section 4 or 5;

c. once payments have begun over a period certain, the period certain will not be changed even if the period certain is shorter than the maximum permitted;

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 2 – Defined Benefit Plans, Continued

Section 3, Determination of Amount to be Distributed Each Year (continued)

d. payments will either be non-increasing or increase only as follows:

- by an annual percentage increase that does not exceed the annual percentage increase in a cost-of-living index that is based on prices of all items and issued by the Bureau of Labor Statistics;
- to the extent of the reduction in the amount of the participant's payments to provide for a survivor benefit upon death, but only if the beneficiary whose life was being used to determine the distribution period described in section 4 dies or is no longer the participant's beneficiary pursuant to a qualified domestic relations order within the meaning of IRC § 414(p);
- to provide cash refunds of employee contributions upon the participant's death; or
- to pay increased benefits that result from a plan amendment.

3.2. Amount Required to be distributed by Required Beginning Date. The amount that must be distributed on or before the participant's required beginning date (or, if the participant dies before distributions begin, the date distributions are required to begin under section 2.2(a) or (b)) is the payment that is required for one payment interval. The second payment need not be made until the end of the next payment interval even if that payment interval ends in the next calendar year. Payment intervals are the periods for which payments are received, e.g., bi-monthly, monthly, semi-annually, or annually. All of the participant's benefit accruals as of the last day of the first distribution calendar year will be included in the calculation of the amount of the annuity payments for payment intervals ending on or after the participant's required beginning date.

3.3. Additional Accruals After First Distribution Calendar Year. Any additional benefits accruing to the participant in a calendar year after the first distribution calendar year will be distributed beginning with the first payment interval ending in the calendar year immediately following the calendar year in which such amount accrues.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 2 – Defined Benefit Plans, Continued

Section 4, Requirements for Annuity Distributions That Commence During a Participant's Lifetime

4.1. Joint Life Annuities Where the Beneficiary is not the Participant's Spouse. If the participant's interest is being distributed in the form of a joint and survivor annuity for the joint lives of the participant and a non-spouse beneficiary, annuity payments to be made on or after the participant's required beginning date to the designated beneficiary after the participant's death must not at any time exceed the applicable percentage of the annuity payment for such period that would have been payable to the participant using the table set forth in Treas. Reg. § 1.401(a)(9)-6T, Q & A –2. If the form of distribution combines a joint and survivor annuity for the joint lives of the participant and a non-spouse beneficiary and a period certain annuity, the requirements in the preceding sentence will apply to annuity payments to be made to the designated beneficiary after the expiration of the period certain.

4.2. Period Certain Annuities. Unless the participant's spouse is the sole designated beneficiary and the form of distribution is a period certain and no life annuity, the period certain for an annuity distribution commencing during the participant's lifetime may not exceed the applicable distribution period for the participant under the Uniform Lifetime Table set forth in Treas. Reg. § 1.401(a)(9)-9 for the calendar year that contains the annuity starting date.

If the annuity starting date precedes the year in which the participant reaches age 70, the applicable distribution period for the participant is the distribution period for age 70 under the Uniform Lifetime Table set forth in Treas. Reg. § 1.401(a)(9)-9 plus the excess of 70 over the age of the participant as of the participant's birthday in the year that contains the annuity starting date. If the participant's spouse is the participant's sole designated beneficiary and the form of distribution is a period certain and no life annuity, the period certain may not exceed the longer of the participant's applicable distribution period, as determined under this section 4.2, or the joint life and last survivor expectancy of the participant and the participant's spouse as determined under the Joint and Last Survivor Table set forth in Treas. Reg. § 1.401(a)(9)-9, using the participant's and spouse 's attained ages as of the participant's and spouse's birthdays in the calendar year that contains the annuity starting date.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 2 – Defined Benefit Plans, Continued

Section 5, When Participant Dies Before Date Distribution Begins

5.1. Participant Survived by Designated Beneficiary. Except as provided in the adoption agreement, if the participant dies before the date distribution of his or her interest begins and there is a designated beneficiary, the participant's entire interest will be distributed, beginning no later than the time described in section 2.2(a) or (b), over the life of the designated beneficiary or over a period certain not exceeding:

(a) unless the annuity starting date is before the first distribution calendar year, the life expectancy of the designated beneficiary determined using the beneficiary's age as of the beneficiary's birthday in the calendar year immediately following the calendar year of the participant's death; or

(b) if the annuity starting date is before the first distribution calendar year, the life expectancy of the designated beneficiary determined using the beneficiary's age as of the beneficiary's birthday in the calendar year that contains the annuity starting date.

5.2. No Designated Beneficiary. If the participant dies before the date distributions begin and there is no designated beneficiary as of September 30 of the year following the year of the participant's death, distribution of the participant's entire interest will be completed by December 31 of the calendar year containing the fifth anniversary of the participant's death.

5.3. Death of Surviving Spouse Before Distributions to Surviving Spouse Begin. If the participant dies before the date distribution of his or her interest begins, the participant's surviving spouse is the participant's sole designated beneficiary, and the surviving spouse dies before distributions to the surviving spouse begin, this section 5 will apply as if the surviving spouse were the participant, except that the time by which distributions must begin will be determined without regard to section 2.2(a).

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Model Plan Amendment Number 2 – Defined Benefit Plans, Continued

Section 6, Definitions

6.1. Designated Beneficiary. The individual who is designated as the beneficiary under section ____ of the plan and is the designated beneficiary under IRC § 401(a)(9) and Treas. Reg. § 1.401(a)(9)-1, Q&A-4.

6.2. Distribution calendar year. A calendar year for which a minimum distribution is required. For distributions beginning before the participant's death, the first distribution calendar year is the calendar year immediately preceding the calendar year, which contains the participant's required beginning date. For distributions beginning after the participant's death, the first distribution calendar year is the calendar year in which distributions are required to begin pursuant to section 2.2.

6.3. Life expectancy. Life expectancy as computed by use of the Single Life Table in Treas. Reg. § 1.401(a)(9)-9.

6.4. Required beginning date. The date specified in section ___ of the plan.

IRC § 401(a)(9) – Rev. Proc. 2002-29 Sample Adoption Agreement – Defined Benefit Plans

Introduction

(Check and complete section 1 below if any required minimum distributions for the 2002 distribution calendar year were made in accordance with the IRC § 401(a)(9) Final and Temporary Regulations.)

Section 1 Effective Date of Plan Amendment

Article ___, Minimum Distribution Requirements, applies for purposes of determining required minimum distributions for distribution calendar years beginning with the 2003 calendar year , as well as required minimum distributions for the 2002 distribution calendar year that are made on or after ___ (Check and complete any of the remaining sections if you wish to modify the rules in sections 2.2 and 5 of Article __ of the plan.)

Section 2- Election to Apply 5 Year Rule to Designated Beneficiaries

If the participant dies before distributions begin and there is a designated beneficiary, distribution to the designated beneficiary is not required to begin by the date specified in the section 2.2 of Article ___ of the plan, but the participant ‘s interest will be distributed to the designated beneficiary by December 31 of the calendar year containing the fifth anniversary of the participant’s death.

If the participant’s surviving spouse is the participant’s sole designated beneficiary and the surviving spouse dies after the participant but before distributions to either the participant or the surviving spouse begin, this election will apply as if the surviving spouse were the participant.

This election will apply to (Check one):

____ All distributions.

____ The following distributions: _____.

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IRC § 401(a)(9) – Rev. Proc. 2002-29 Sample Adoption Agreement – Defined Benefit Plans, Continued

Section 3, Election to Allow Participants or Beneficiaries to Elect 5 Year Rule

Participants or beneficiaries may elect on an individual basis whether the 5-year rule or the life expectancy rule in sections 2.2 and 5 of Article ___ of the plan applies to distributions after the death of a participant who has a designated beneficiary. The election must be made no later than the earlier of September 30 of the calendar year in which distribution would be required to begin under section 2.2 of Article ___ of the plan, or by September 30 of the calendar year which contains the fifth anniversary of the participant's (or, if applicable, surviving spouse's) death. If neither the participant nor beneficiary makes an election under this paragraph, distributions will be made in accordance with sections 2.2 and 5 of Article ___ of the plan, if applicable, the elections in section 2 above.

Section 4, Election to Allow Designated Beneficiaries To Elect Distributions Over Life Expectancy

A designated beneficiary who is receiving payments under the 5-year rule may make a new election to receive payments under the life expectancy rule until December 31, 2003, provided that all amounts that would have been required to be distributed under the life expectancy rule for all distribution calendar year before 2004 are distributed by the earlier of December 31, 2003 or the end of the 5-year period.

IRC § 401(a)(9) and Rev. Ruling 2001-62

Rev. Ruling 2001-62

As stated above, Rev. Ruling 2001-62 added the new mortality table, 94 GAR to be used with IRC §§ 415 and 417 calculations. In addition to adding the new table, Rev. Ruling 2001-62 also contained two model plan amendments relating to the adoption of the new table.

Practitioners Note

These sample amendments will probably show up as good faith amendments relating to EGTRRA Good Faith and the adoption of the new mortality table. Care should be taken when reviewing the EGTRRA amendments submitted by plan sponsors to make sure that the amendments submitted comply with the requirements of the Code and the Regulations and that they incorporate the correct provisions.

IRC § 401(a)(9) and Rev. Ruling 2001-62 Model Amendments

Model Plan Amendment Number 1

i. Effective date. This section shall apply to distributions with annuity starting dates on or after

ii. Notwithstanding any other plan provisions to the contrary, the applicable mortality table used for purposes of adjusting any benefit or limitation under § 415(b)(2)(B), (C), or (D) of the Internal Revenue Code as set forth in section ___ of the plan and the applicable mortality table used for purposes of satisfying the requirements of § 417(e) of the Internal Revenue Code as set forth in section ___ of the plan is the table prescribed in Rev. Rul. 2001-62.

iii. For any distribution with an annuity starting date on or after the effective date of this section and before the adoption date of this section, if application of the amendment as of the annuity starting date would have caused a reduction in the amount of any distribution, such reduction is not reflected in any payment made before the adoption date of this section. However, the amount of any such reduction that is required under IRC § 415(b)(2)(B) must be reflected actuarially over any remaining payments to the participant.

Note: This amendment should be used for plans that reference the applicable mortality table only for the purposes of adjusting any benefit or limitation under § 415(b)(2)(B), (C), or (D) of the Internal Revenue Code and satisfying the requirements of § 417(e) of the Internal Revenue Code. Paragraph 3 of this amendment should be used only if the effective date of the amendment is earlier than the adoption date of the amendment.

IRC § 401(a)(9) and Rev. Ruling 2001-62

Model Plan Amendment Number 2

1. Effective date. This section shall apply to distributions with annuity starting dates on or after

2. Notwithstanding any other plan provisions to the contrary, any reference in the plan to the mortality table prescribed in Rev. Rul. 95-6 shall be construed as a reference to the mortality table prescribed in Rev. Rul. 2001- 62 for all purposes under the plan.

3. For any distribution with an annuity starting date on or after the effective date of this section and before the adoption date of this section, if application of the amendment as of the annuity starting date would have caused a reduction in the amount of any distribution, such reduction is not reflected in any payment made before the adoption date of this section. However, the amount of any such reduction that is required under IRC § 415(b)(2)(B) must be reflected actuarially over any remaining payments to the participant.

Note: This amendment should be used for plans that specifically reference the mortality table provided in Rev. Rul. 95-6 and apply that table for other purposes as well as for purposes of adjusting any benefit or limitation under § 415(b)(2)(B), (C), or (D) and satisfying the requirements of § 417(e), where the plan sponsor wishes to replace the mortality table provided in Rev. Rul. 95-6 with the mortality table provided in Rev. Rul. 2001-62 for all purposes. If the plan references the mortality table prescribed in Rev. Rul. 95-6 using some other label (such as, for example, the GAM 83 blended mortality table), the plan's term should be used in place of the reference to the mortality table prescribed in Rev. Rul. 95-6. Paragraph 3 of this amendment should be used only if the effective date of the amendment is earlier than the adoption date of the amendment.

References

26 C.F.R §§ 1.401(a)(9)-0 through -9, Rev. Proc. 2003-10, Rev. Proc. 2002-29, Rev. Proc. 2001-62, Notice 2003-2, Rev. Ruling 2001-62

Minimum Distribution and Inclusion Requirements for IRC § 457 Plans

Introduction

– EGTRRA § 649,

– Amendment is required,

– Effective Date: Distributions after December 31, 2001.

Pre-EGTRRA

Amounts that are deferred under an IRC § 457 plan are generally includible in income when paid or made available to the participant. If the plan does not meet the requirements of IRC § 457, then amounts deferred should be included in the income of the participant when those amounts are not subject to a substantial risk of forfeiture, regardless of whether the amounts have been paid or made available.

Post-EGTRRA

Amounts deferred under an IRC § 457 plan of a state or local government are includible in income when paid. Additionally, the special minimum distribution rules applicable to IRC § 457 plans is repealed.

Explanation of provision

The provision provides that amounts deferred under an IRC § 457 plan of a State or local government are includible in income when paid. The provision also repeals the special minimum distribution rules applicable to an IRC § 457 plans. Thus, such plans are subject to the minimum distribution rules applicable to qualified plans.

APPENDIX

Notice 2001-57 Sample Plan Amendments

Introduction

Notice 2001-57 provides sample plan amendments intended to bring qualified employee benefit plans into compliance with the requirements of IRC § 401(a) as amended by EGTRRA. These sample amendments will help plan sponsors and sponsors and adopters of pre-approved plans comply with the requirement to adopt good faith EGTRRA plan amendments on a timely basis.

The amendments contained in Notice 2001-57 are not intended to be model plan amendments, but instead samples of the types of amendments that plans' need to adopt in order to be considered a good faith, timely amended plan.

When reviewing EGTRRA amendments to qualified employee benefit plans for determination letter purposes, you will in all likelihood see adopted amendments that simply take the sample amendments of Notice 2001-57 and adopt them, word for word. Similarly, there will also be plan amendments that appear to be nothing like the sample amendments provided in Notice 2001-57. The agent reviewing these amendments should look at the meaning and effect of the amendments, not just the fact that those amendments are different than the sample language. If the effect on the plan document achieves the required goal, then those amendments will also satisfy the good faith requirements.

Below is a copy of Notice 2001-57. When reviewing the chapter above, refer to this appendix for sample plan language relating to the various provisions of EGTRRA.

Notice 2001-57

I. Purpose

This notice provides sample plan amendments for the changes to the plan qualification requirements under IRC § 401(a) that were made by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 ("EGTRRA"). These sample amendments will help plan sponsors and sponsors and adopters of pre-approved plans comply with the requirement to adopt good faith EGTRRA plan amendments on a timely basis.

In some cases, plan sponsors may be able to adopt the sample amendments verbatim. In other cases, plan sponsors may have to modify the sample amendments to make the amendments appropriate for adoption in their plans.

The sample amendments are examples of plan amendments that satisfy the good faith requirement and should not be viewed as interpretive guidance on the EGTRRA changes to the qualification requirements. Other guidance will address the EGTRRA changes. See, for example, Notice 2001-56, this bulletin.

II. Background

EGTRRA, which was enacted on June 7, 2001, includes numerous changes to the qualified plan rules. Most of these changes are effective in years beginning after December 31, 2001. While many of the changes are not mandatory, a plan sponsor that chooses to implement an optional provision of EGTRRA will have to amend its plan to conform plan provisions to plan operation.

EGTRRA Remedial Amendment Period Requirements

Notice 2001-42, designated as disqualifying provisions under Treas. Reg. § 1.401(b)-1(b) plan provisions that

1. must be amended to satisfy the qualification requirements of the Code because of changes in those requirements made by EGTRRA or

2. are integral to qualification requirements changed by EGTRRA.

The effect of this designation is to provide a remedial amendment period under IRC § 401(b), ending no earlier than the end of the 2005 plan year, in which any needed retroactive remedial EGTRRA plan amendments may be adopted (the EGTRRA remedial amendment period).

Continued on next page

Notice 2001-57, Continued

EGTRRA Remedial Amendment Period Requirements (continued)

The availability of the EGTRRA remedial amendment period is conditioned on the timely adoption of required good faith EGTRRA plan amendments. There are two circumstances in which a good faith EGTRRA plan amendment is required.

- First, a plan is required to have a good faith EGTRRA plan amendment in effect for a year if the plan is required to implement a provision of EGTRRA for the year and the plan language, prior to the amendment, is not consistent with the provision of EGTRRA.

- Second, a plan is required to have a good faith EGTRRA plan amendment in effect for a year if the plan sponsor elects to implement a provision of EGTRRA for the year and the plan language, prior to the amendment, is not consistent with the operation of the plan in a manner consistent with EGTRRA.

A good faith EGTRRA plan amendment is timely if it is adopted no later than the later of

(i) the end of the plan year in which the EGTRRA change in the qualification requirements is required to be, or is optionally, put into effect under the plan or

(ii) the end of the GUST remedial amendment period for the plan.

Good faith defined

Good Faith. A plan amendment is a good faith EGTRRA plan amendment only if the amendment represents a reasonable effort to take into account all of the requirements of the applicable EGTRRA provision and does not reflect an unreasonable or inconsistent interpretation of the provision.

Continued on next page

Notice 2001-57, Continued

III. Sample EGTRRA Plan Amendments-introduction

As provided in Notice 2001-42, the Service is publishing sample EGTRRA plan amendments that can be adopted or used in drafting individualized good faith plan amendments for individually designed and pre-approved plans. In some cases, plan sponsors may be able to adopt the sample amendments in this notice verbatim. In other cases, plan sponsors may have to modify the sample amendments to make them appropriate for adoption in their plans.

The availability of the EGTRRA remedial amendment period is conditioned on the timely adoption of good faith EGTRRA plan amendments, as noted above. Many of the issues and questions concerning the EGTRRA changes to the qualification requirements are not addressed in the sample amendments. Therefore, the sample amendments may not contain all those provisions that will be necessary to comply with the EGTRRA changes once guidance on the changes is issued. Nevertheless, proper adoption of the sample amendments, or plan amendments that are materially similar to the sample amendments, will, with respect to the EGTRRA provisions addressed in the amendments that a sponsor adopts, satisfy the good faith plan amendment requirement and allow the amended plan provisions to be retroactively amended within the EGTRRA remedial amendment period.

Of course, regardless of whether a plan sponsor adopts the sample amendments in this notice or its own good faith amendments, the operation of the plan must also reflect a good faith, reasonable interpretation of EGTRRA. Plan operation will not reflect a good faith, reasonable interpretation of EGTRRA unless the operation is consistent with published guidance beginning no later than the effective date of the guidance.
Some of the sample amendments reflect other guidance issued with respect to the applicable section of EGTRRA.

Continued on next page

Notice 2001-57, Continued

III. Sample EGTRRA Plan Amendments-introduction-2001-56

Notice 2001-56 provides guidance with respect to the effective dates of the increase in the § 401(a)(17) compensation limit under EGTRRA § 611(c), the changes to the top-heavy requirements of § 416 under EGTRRA § 613, and the change to the suspension period for hardship distributions in a § 401(k) plan under EGTRRA § 636(a).

The Service and Treasury will issue additional guidance on other EGTRRA changes in the near future, including the increase in the § 415(b) dollar limit under EGTRRA § 611(a) and the catch-up contribution provisions under EGTRRA § 631. The sample amendments in this notice, materially similar amendments, and other good faith amendments will continue to be good faith EGTRRA plan amendments, even after the publication of additional guidance. However, as provided above, a plan will have to be operated in accordance with such additional guidance as of the effective date of the guidance, notwithstanding the provisions of the plan's good faith amendments.

Good Faith. The sample amendments, and plan amendments that are materially similar to the sample amendments, are sufficient to satisfy the good faith plan amendment requirement. A plan amendment that represents a reasonable effort to take into account all of the requirements of the applicable EGTRRA provision and does not reflect an unreasonable or inconsistent interpretation of the provision will not fail to be a good faith plan amendment merely because it is not materially similar to a sample EGTRRA plan amendment.

Continued on next page

Notice 2001-57, Continued

III-Sample EGTRRA Plan Amendments-Scope

Scope of the Sample Amendments. The sample amendments address most of the EGTRRA changes for which plan amendments are either required or optional. The sample amendments do not address changes not generally applicable to plans; changes not effective prior to the issuance of regulations; and changes under EGTRRA §§ 602 and 617, regarding deemed individual retirement accounts and annuities and Roth contribution programs in qualified plans, respectively.

The good faith plan amendment requirement described above applies with respect to all the EGTRRA changes to the plan qualification requirements, including those that are not addressed in the sample amendments. The sample amendments also do not address EGTRRA changes regarding deduction limits and excise taxes.

Some amendments that would generally be optional may, in certain circumstances, be required. Plan sponsors should make the determination of which amendments are appropriate after reviewing the EGTRRA changes in the context of their plans and particular circumstances. The sample amendments include notes to assist plan sponsors in making this determination.

III-Sample EGTRRA Plan Amendments-format of amendments

Format of the Sample Amendments. The format of the sample amendments generally follows the design of pre-approved plans, including all M&P plans, that employ a "basic plan document" and an "adoption agreement." Thus, each sample amendment includes language designed for inclusion in a basic plan document. In addition, some of the sample amendments include language designed for inclusion in an adoption agreement to allow the employer to indicate whether, or when, the corresponding basic plan document provision will be effective in the employer's plan and to select among options related to the application of the basic plan document provision. Sponsors may modify the amendments to specify the "default" option that will apply if an employer does not select an alternative option in the adoption agreement.

Sponsors of plans that do not use an adoption agreement should modify the format of the amendments to incorporate the appropriate adoption agreement option(s) in the terms of the amendments. The adoption agreement format is not used in the sample amendment for multiemployer plans for EGTRRA §§ 611(a) and 654, regarding changes in the limitations of IRC § 415(b).

Continued on next page

Notice 2001-57, Continued

III-Sample EGTRRA Plan Amendments-format of amendments (continued)

Pre-approved plans that are amended for EGTRRA in any manner other than by the adoption of a separate, clearly identified addendum to the plan (or basic plan document) and/or adoption agreement, limited to the provisions of EGTRRA, will be treated as individually designed plans. The sample EGTRRA plan amendments in this notice are designed to be easily incorporated in such a separate addendum, so that a pre-approved plan will not be treated as an individually designed plan.

The sample amendments have been designed to facilitate their adoption in cases where the plan's language, including definitions, is similar to the sample plan provisions in the Service's *Listing of Required Modifications* (which is available at http://www.irs.gov/ep). Thus, the sample amendments generally do not provide definitions of terms used in the amendments if equivalent terms should already be defined in a plan. Among these terms are the following: annual addition, annual benefit, defined benefit compensation limitation, determination date for top-heavy status, elective deferrals, eligible retirement plan, eligible rollover distribution, limitation year, and matching contributions. Of course, a sponsor needs to ensure that the terminology of its good faith EGTRRA plan amendments is consistent with the plan's existing terminology and definitions. The sample amendments generally do not address issues of plan design. Sponsors may want to add to or modify the sample amendments to address these issues.

The sample amendments are arranged in these categories: all plans, defined contribution plans, IRC § 401(k) plans, and defined benefit plans.

III-Sample EGTRRA Plan Amendments effective dates

Effective Dates. Sponsors that adopt the sample amendments may have to modify the amendments' effective dates to ensure that no optional plan amendment is effective earlier than the date on which the corresponding EGTRRA change is put into effect under the plan. For plans maintained pursuant to a collective bargaining agreement, the effective date of the sample amendment for EGTRRA § 633, regarding faster vesting of matching contributions, may be modified to reflect the effective date in § 633(c)(2).

Notice 2001-57, Continued

III-Sample EGTRRA Plan Amendments-time and manner of adoption

Time and Manner of Adoption. Although good faith EGTRRA plan amendments are generally not required to be adopted earlier than the end of the plan year in which the amendments are required to be, or are optionally, put into effect, earlier adoption may be necessary in order to avoid a decrease or elimination of benefits protected by § 411(d)(6). See the discussion of § 411(d)(6) in section III of Notice 2001-42.

A pre-approved plan may be amended by the document's sponsor to the extent authorized. For example, a sponsor of an M&P plan may amend the plan on behalf of adopting employers. If the amendment of a pre-approved plan includes an addendum to the adoption agreement, the addendum is effective only if signed and dated by the employer.

III-Sample EGTRRA Plan Amendments effective dates

Determination Letters and Reliance. Until further notice, the Service will not consider EGTRRA in issuing determination, opinion and advisory letters and such letters may not be relied on with respect to the EGTRRA changes, regardless of whether the plan has been amended by the adoption of the sample EGTRRA plan amendments. However, an employer's ability to otherwise rely on a favorable letter will not be adversely affected by the timely adoption of good faith EGTRRA plan amendments.

III-Sample EGTRRA Plan Amendments effective dates–possible subsequent amendments

Possible Subsequent Required Amendments. The Service and Treasury will provide additional guidance on EGTRRA. Plans amended by the timely adoption of good faith EGTRRA plan amendments, including the sample amendments, may have to be amended again by the end of the EGTRRA remedial amendment period to comply with additional guidance. In addition, as provided above, plans will have to be operated consistent with such additional guidance as of the effective date of the guidance.

Application to Other Plans. Although the sample amendments are designed for plans qualified under § 401(a), some of the sample amendments may be used in an appropriate context in other plans, including § 403(b) plans. Future guidance will address the EGTRRA changes applicable to § 457 plans.

Sample EGTRRA Plan Amendments for All Plans

Sample Preamble Adopting Good Faith Amendments and Superseding Inconsistent Plan Provisions

(The following sample preamble is optional. However, plan sponsors that do not adopt this or a similar provision will have to modify some of the amendments that follow to specify effective dates and supersede inconsistent plan provisions.)

AMENDMENT OF THE PLAN FOR EGTRRA

PREAMBLE

1. **Adoption and effective date of amendment.** This amendment of the plan is adopted to reflect certain provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). This amendment is intended as good faith compliance with the requirements of EGTRRA and is to be construed in accordance with EGTRRA and guidance issued there under. Except as otherwise provided, this amendment shall be effective as of the first day of the first plan year beginning after December 31, 2001.

2. **Supersession of inconsistent provisions.** This amendment shall supersede the provisions of the plan to the extent those provisions are inconsistent with the provisions of this amendment.

Sample Plan Amendment for § 612 of EGTRRA

(The following amendment is required for plans that provide loans to participants but prohibit the making of loans to owner-employees or Subchapter S shareholder-employees.)

SECTION ___. PLAN LOANS FOR OWNER-EMPLOYEES AND SHAREHOLDER EMPLOYEES

Effective for plan loans made after December 31, 2001, plan provisions prohibiting loans to any owner-employee or shareholder-employee shall cease to apply.

Sample EGTRRA Plan Amendments for Defined Contribution Plans

Sample Plan Amendment for EGTRRA §§ 611(b) and 632-section 415

(Although plans may impose lower limits on contributions and allocations than the limits under IRC § 415(c), the following amendment will generally be required in order to avoid a related violation of § 401(a). This could occur, for example, if the plan allocates excess annual additions to a suspense account. (See Notice 99-44, Q&A-8, 1999-2 C.B. 326.) A plan that correctly incorporates the § 415(c) limits by reference will automatically reflect the EGTRRA changes and need not be amended.)

SECTION ___. LIMITATIONS ON CONTRIBUTIONS

1. **Effective date**. This section shall be effective for limitation years beginning after December 31, 2001.

2. **Maximum annual addition.** Except to the extent permitted under section ___ of this amendment [enter the section of the amendment that provides for catch-up contributions under EGTRRA § 631] and IRC § 414(v), if applicable, the annual addition that may be contributed or allocated to a participant's account under the plan for any limitation year shall not exceed the lesser of:

    a. $ 40,000, as adjusted for increases in the cost-of-living under IRC § 415(d), or
    b. 100 percent of the participant's compensation, within the meaning of IRC § 415(c)(3), for the limitation year.

The compensation limit referred to in (b) shall not apply to any contribution for medical benefits after separation from service (within the meaning of IRC §§ 401(h) or 419A(f)(2)) which is otherwise treated as an annual addition.

Continued on next page

Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment for EGTRRA § 611(c)-increase in compensation limit

The following sample amendment is optional. It should be adopted if the plan sponsor wants to increase the limit on annual compensation taken into account under the plan in plan years beginning after December 31, 2001, to $200,000. If the plan bases allocations for plan years beginning after December 31, 2001, on compensation for periods beginning before January 1, 2002, the amendment should be modified to include provisions similar to the prior year limit and adoption agreement provisions of the sample amendment for EGTRRA § 611(c) for defined benefit plans. Also see Notice 2001-56 for guidance regarding the effective date of the change made by EGTRRA § 611(c).

SECTION ___. INCREASE IN COMPENSATION LIMIT

The annual compensation of each participant taken into account in determining allocations for any plan year beginning after December 31, 2001, shall not exceed $ 200,000, as adjusted for cost-of-living increases in accordance with IRC § 401(a)(17)(B). Annual compensation means compensation during the plan year or such other consecutive 12-month period over which compensation is otherwise determined under the plan (the determination period). The cost-of-living adjustment in effect for a calendar year applies to annual compensation for the determination period that begins with or within such calendar year.

Continued on next page

Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment for EGTRRA § 613-top heavy

The following sample amendment applies to all plans that are required to include provisions to determine whether the plan is top-heavy and that apply if the plan is top-heavy. The amendment is required. However, the amendment is not required for plans that consist solely of a cash or deferred arrangement which meets the safe harbor requirements of IRC § 401(k)(12) and matching contributions with respect to which the safe harbor requirements of IRC § 401(m)(11) are met. For these plans, see the sample plan amendments for EGTRRA § 613 under **Sample Plan Amendments for IRC § 401(k) Plans**.

SECTION ___. MODIFICATION OF TOP-HEAVY RULES

1. Effective date. This section shall apply for purposes of determining whether the plan is a top-heavy plan under IRC § 416(g) for plan years beginning after December 31, 2001, and whether the plan satisfies the minimum benefits requirements of IRC § 416(c) for such years. This section amends section ___ of the plan [enter the section of the plan that includes top-heavy provisions].

2. **Determination of top-heavy status.**

   2.1 Key employee. Key employee means any employee or former employee (including any deceased employee) who at any time during the plan year that includes the determination date was an officer of the employer having annual compensation greater than $ 130,000 (as adjusted under IRC § 416(i)(1) for plan years beginning after December 31, 2002), a 5-percent owner of the employer, or a 1-percent owner of the employer having annual compensation of more than $ 150,000. For this purpose, annual compensation means compensation within the meaning of IRC § 415(c)(3). The determination of who is a key employee will be made in accordance with IRC § 416(i)(1) and the applicable regulations and other guidance of general applicability issued there under.

Continued on next page

Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment for EGTRRA § 613-top heavy-top heavy (continued)

2.2 Determination of present values and amounts. This section 2.2 shall apply for purposes of determining the present values of accrued benefits and the amounts of account balances of employees as of the determination date.

2.2.1 Distributions during year ending on the determination date. The present values of accrued benefits and the amounts of account balances of an employee as of the determination date shall be increased by the distributions made with respect to the employee under the plan and any plan aggregated with the plan under IRC § 416(g)(2) during the 1-year period ending on the determination date. The preceding sentence shall also apply to distributions under a terminated plan which, had it not been terminated, would have been aggregated with the plan under IRC § 416(g)(2)(A)(i). In the case of a distribution made for a reason other than separation from service, death, or disability, this provision shall be applied by substituting "5-year period" for "1-year period."

2.2.2 Employees not performing services during year ending on the determination date. The accrued benefits and accounts of any individual who has not performed services for the employer during the 1-year period ending on the determination date shall not be taken into account.

3. Minimum benefits.

3.1 Matching contributions. Employer matching contributions shall be taken into account for purposes of satisfying the minimum contribution requirements of IRC § 416(c)(2) and the plan. The preceding sentence shall apply with respect to matching contributions under the plan or, if the plan provides that the minimum contribution requirement shall be met in another plan, such other plan. Employer matching contributions that are used to satisfy the minimum contribution requirements shall be treated as matching contributions for purposes of the actual contribution percentage test and other requirements of IRC § 401(m).

3.2 Contributions under other plans. The employer may provide in the adoption agreement that the minimum benefit requirement shall be met in another plan (including another plan that consists solely of a cash or deferred arrangement which meets the requirements of IRC § 401(k)(12) and matching contributions with respect to which the requirements of IRC § 401(m)(11) are met).

Continued on next page

Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment for EGTRRA § 613-top heavy-top heavy (continued)

Adoption agreement provision--Minimum Benefits for Employees Also Covered Under Another Plan:

The employer should describe below the extent, if any, to which the top-heavy minimum benefit requirement of IRC § 416(c) and section ___ of the plan shall be met in another plan. This should include the name of the other plan, the minimum benefit that will be provided under such other plan, and the employees who will receive the minimum benefit under such other plan.

Sample Plan Amendment for EGTRRA § 633-increased vesting for matching contributions

Plans that provide for matching contributions, as defined in IRC § 401(m)(4)(A), that do not vest at least as rapidly as under one of the two alternative schedules in EGTRRA § 633 must be amended to satisfy EGTRRA § 633 for contributions for plan years beginning after December 31, 2001.

The following amendment is effective for plan years beginning after December 31, 2001, but applies to all matching contributions under the plan, including contributions for plan years beginning before January 1, 2002. The amendment may be modified to limit its application to contributions for plan years beginning after December 31, 2001. The amendment may also be modified to provide for any other vesting schedule that is at least as rapid as one of the alternative schedules in EGTRRA § 633.

SECTION__. VESTING OF EMPLOYER MATCHING CONTRIBUTIONS

1. Applicability. This section shall apply to participants with accrued benefits derived from employer matching contributions who complete an hour of service under the plan in a plan year beginning after December 31, 2001. If elected by the employer in the adoption agreement, this section shall also apply to all other participants with accrued benefits derived from employer matching contributions.

2. Vesting schedule. A participant's accrued benefit derived from employer matching contributions shall vest as provided by the employer in the adoption agreement. If the vesting schedule for employer matching contributions in Option 3 of the adoption agreement is elected, the election in section ___ of the plan [enter the section of the plan that provides for the election of the former vesting schedule under IRC § 411(a)(10)] shall apply.

Continued on next page

Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment for EGTRRA § 633-increased vesting for matching contributions increased vesting for matching contributions (continued)

Adoption agreement provisions

Application of Section ___, Vesting of Employer Matching Contributions:

(Check the following option to apply section ___, Vesting of Employer Matching Contributions, to all participants with accrued benefits derived from employer matching contributions, rather than just those who complete an hour of service under the plan in a plan year beginning after December 31, 2001.)

Section ___, Vesting of Employer Matching Contributions, shall apply to all participants with accrued benefits derived from employer matching contributions.

Vesting Schedule for Employer Matching Contributions:

Option 1. A participant's accrued benefit derived from employer matching contributions shall be fully and immediately vested.

Option 2. A participant's accrued benefit derived from employer matching contributions shall be nonforfeitable upon the participant's completion of three years of vesting service.

Option 3. A participant's accrued benefit derived from employer matching contributions shall vest according to the following schedule:

Years of vesting service	Nonforfeitable percentage
2	20
3	40
4	60
5	80
6	100

Sample Plan Amendment for EGTRRA §§ 636(b), 641, 642 and 643-direct rollover

The following sample amendment is required. However, the third paragraph should be deleted in the case of plans that do not provide for hardship distributions. The fourth paragraph should be deleted in the case of plans that do not have after-tax employee contributions.

SECTION ___. DIRECT ROLLOVERS OF PLAN DISTRIBUTIONS

1. **Effective date.** This section shall apply to distributions made after December 31, 2001.

2. **Modification of definition of eligible retirement plan.** For purposes of the direct rollover provisions in section ___ of the plan, an eligible retirement plan shall also mean an annuity contract described in IRC § 403(b) and an eligible plan under IRC § 457(b) which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this plan. The definition of eligible retirement plan shall also apply in the case of a distribution to a surviving spouse, or to a spouse or former spouse who is the alternate payee under a qualified domestic relation order, as defined in IRC § 414(p).

3. **Modification of definition of eligible rollover distribution to exclude hardship distributions.** For purposes of the direct rollover provisions in section ___ of the plan, any amount that is distributed on account of hardship shall not be an eligible rollover distribution and the distributee may not elect to have any portion of such a distribution paid directly to an eligible retirement plan.

4. **Modification of definition of eligible rollover distribution to include after-tax employee contributions.** For purposes of the direct rollover provisions in section ___ of the plan, a portion of a distribution shall not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions which are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in IRC § 408(a) or (b), or to a qualified defined contribution plan described in IRC § 401(a) or 403(a) that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible.

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Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment to Specify Additional Types of Rollovers Accepted by the Plan Pursuant to EGTRRA §§ 641, 642 and 643

A plan is not required to accept rollover contributions, including direct rollovers under IRC § 401(a)(31). The following optional sample amendment may be used to specify additional types of rollovers the plan will accept pursuant to EGTRRA §§ 641, 642 and 643. A plan that accepts rollovers may be required to separately account for such amounts.

SECTION ___. ROLLOVERS FROM OTHER PLANS

If provided by the employer in the adoption agreement, the plan will accept participant rollover contributions and/or direct rollovers of distributions made after December 31, 2001, from the types of plans specified in the adoption agreement, beginning on the effective date specified in the adoption agreement.

(Adoption agreement provisions)

Direct Rollovers:

The plan will accept a direct rollover of an eligible rollover distribution from: (Check each that applies or none.)

- a qualified plan described in IRC §§ 401(a) or 403(a), excluding after-tax employee contributions.
- a qualified plan described in IRC §§ 401(a) or 403(a), including after-tax employee contributions.
- an annuity contract described in IRC § 403(b), excluding after-tax employee contributions.
- an eligible plan under IRC § 457(b) which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

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Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment to Specify Additional Types of Rollovers Accepted by the Plan Pursuant to EGTRRA §§ 641, 642 and 643 (continued)

Participant Rollover Contributions from Other Plans:

The plan will accept a participant contribution of an eligible rollover distribution from: (Check each that applies or none.)

a qualified plan described in IRC §§ 401(a) or 403(a).

an annuity contract described in IRC § 403(b).

an eligible plan under IRC § 457(b) which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

Participant Rollover Contributions from IRAs:

The plan: (Choose one.)

will

will not

accept a participant rollover contribution of the portion of a distribution from an individual retirement account or annuity described in IRC §§ 408(a) or 408(b) that is eligible to be rolled over and would otherwise be includible in gross income.

Effective Date of Direct Rollover and Participant Rollover Contribution Provisions:

Section ___, Rollovers From Other Plans, shall be effective:

(Enter a date no earlier than January 1, 2002.)

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Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment for EGTRRA § 648-rollovers disregarded for involuntary cash outs

The following optional sample amendment may be adopted by plans that provide for involuntary cash-outs, other than plans that are subject to the qualified joint and survivor annuity requirements of IRC §§ 401(a)(11) and 417. Note that this amendment will result in the involuntary distribution of a separated participant's account over $ 5,000 if the portion of the account that is not attributable to rollover contributions is $ 5,000 or less.

SECTION ___. ROLLOVERS DISREGARDED IN INVOLUNTARY CASH-OUTS

Applicability and effective date. This section shall apply if elected by the employer in the adoption agreement and shall be effective as specified in the adoption agreement.

Rollovers disregarded in determining value of account balance for involuntary distributions. If elected by the employer in the adoption agreement, for purposes of section ___ of the plan [enter the section of the plan that provides for the involuntary distribution of vested accrued benefits of $ 5,000 or less], the value of a participant's nonforfeitable account balance shall be determined without regard to that portion of the account balance that is attributable to rollover contributions (and earnings allocable thereto) within the meaning of IRC §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3)(A)(ii), and 457(e)(16). If the value of the participant's nonforfeitable account balance as so determined is $ 5,000 or less, the plan shall immediately distribute the participant's entire nonforfeitable account balance.

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Sample EGTRRA Plan Amendments for Defined Contribution Plans, Continued

Sample Plan Amendment for EGTRRA § 648-rollovers disregarded for involuntary cash outs (continued)

Adoption agreement provisions)

Treatment of Rollovers in Application of Involuntary Cash-out Provisions:

The employer: (choose one)

elects

does not elect

to exclude rollover contributions in determining the value of the participant's nonforfeitable account balance for purposes of the plan's involuntary cash-out rules.

If the employer has elected to exclude rollover contributions, the election shall apply with respect to distributions made after:

(Enter a date no earlier than December 31, 2001.)

with respect to participants who separated from service after:

Enter date. The date may be earlier than December 31, 2001.)

Sample Plan Amendment for EGTRRA § 666

(The following sample amendment is required for plans subject to the multiple use test described in Treas. Reg. § 1.401(m)-2.)

SECTION ___. REPEAL OF MULTIPLE USE TEST

The multiple use test described in Treas. Reg. § 1.401(m)-2 and section ___ of the plan shall not apply for plan years beginning after December 31, 2001.

Sample Plan Amendments for IRC § 401(K) Plans

Sample Plan Amendment for EGTRRA § 611(d)-402(g) increase in limit

Unless the plan correctly incorporates the limitation of IRC § 402(g) by reference, the plan cannot permit the higher amount of elective deferrals under EGTRRA unless it adopts the following or similar amendment.

SECTION ___. ELECTIVE DEFERRALS -- CONTRIBUTION LIMITATION

No participant shall be permitted to have elective deferrals made under this plan, or any other qualified plan maintained by the employer during any taxable year, in excess of the dollar limitation contained in IRC § 402(g) in effect for such taxable year, except to the extent permitted under section ___ of this amendment [enter the section of the amendment that provides for catch-up contributions under EGTRRA § 631] and IRC § 414(v), if applicable.

Sample Plan Amendment for EGTRRA § 611(f)-Simple 401k amendment

The following sample amendment is only for SIMPLE 401(k) plans. This amendment is not necessary if the plan correctly incorporates the limitation in IRC § 408(p)(2)(A)(ii).

SECTION ___. MAXIMUM SALARY REDUCTION CONTRIBUTIONS

Except to the extent permitted under section ___ of this amendment [enter the section of the amendment that provides for catch-up contributions under EGTRRA § 631 and IRC § 414(v), if applicable, the maximum salary reduction contribution that can be made to this plan is the amount determined under IRC § 408(p)(2)(A)(ii) for the calendar year.

Sample Plan Amendment for EGTRRA § 613-top heavy not needed if plan satisfies ADP/ACP

The following sample amendment is only for plans that consist **solely** of a cash or deferred arrangement which meets the requirements of IRC § 401(k)(12) and matching contributions with respect to which the requirements of IRC § 401(m)(11) are met.

SECTION ___. MODIFICATION OF TOP-HEAVY RULES

The top-heavy requirements of IRC § 416 and section ___ of the plan shall not apply in any year beginning after December 31, 2001, in which the plan consists solely of a cash or deferred arrangement which meets the requirements of IRC § 401(k)(12) and matching contributions with respect to which the requirements of IRC § 401(m)(11) are met.

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Sample Plan Amendments for IRC § 401(K) Plans, Continued

Sample Plan Amendment for EGTRRA § 631-catch up contributions

The following amendment is optional.

SECTION ___. CATCH-UP CONTRIBUTIONS

If elected by the employer in the adoption agreement, all employees who are eligible to make elective deferrals under this plan and who have attained age 50 before the close of the plan year shall be eligible to make catch-up contributions in accordance with, and subject to the limitations of, IRC § 414(v). Such catch-up contributions shall not be taken into account for purposes of the provisions of the plan implementing the required limitations of IRC §§ 402(g) and 415. The plan shall not be treated as failing to satisfy the provisions of the plan implementing the requirements of IRC §§ 401(k)(3), 401(k)(11), 401(k)(12), 410(b), or 416, as applicable, by reason of the making of such catch-up contributions.

(Adoption agreement provision)

Section ___, Catch-up Contributions: (Choose one.)

shall apply to contributions after . (Enter December 31, 2001 or a later date).

shall not apply.

Continued on next page

Sample Plan Amendments for IRC § 401(K) Plans, Continued

Sample Plan Amendment for EGTRRA § 631-catch up contributions6

Sample Plan Amendment for EGTRRA § 636(a)

The following sample amendment is optional for IRC § 401(k) plans (other than plans described in IRC §§ 401(k)(12) or 401(m)(11)) that use the safe harbor (deemed) standards for hardship distributions of elective contributions set forth in Treas. Reg. § 1.401(k)-1(d)(2)(iv). The amendment is required for a plan described in IRC §§ 401(k)(12) or 401(m)(11). Also see Notice 2001-56 for guidance regarding the effective date of the change made by EGTRRA § 636(a).

SECTION ___. SUSPENSION PERIOD FOLLOWING HARDSHIP DISTRIBUTION

A participant who receives a distribution of elective deferrals after December 31, 2001, on account of hardship shall be prohibited from making elective deferrals and employee contributions under this and all other plans of the employer for 6 months after receipt of the distribution. A participant who receives a distribution of elective deferrals in calendar year 2001 on account of hardship shall be prohibited from making elective deferrals and employee contributions under this and all other plans of the employer for the period specified by the employer in the adoption agreement.

Adoption agreement provision

Suspension Period for Hardship Distributions: (Choose one.)

- A participant who receives a distribution of elective deferrals in calendar year 2001 on account of hardship shall be prohibited from making elective deferrals and employee contributions under this and all other plans of the employer for 6-months after receipt of the distribution or until January 1, 2002, if later.

- A participant who receives a distribution of elective deferrals in calendar year 2001 on account of hardship shall be prohibited from making elective deferrals and employee contributions under this and all other plans of the employer for the period specified in the provisions of the plan relating to suspension of elective deferrals that were in effect prior to this amendment.

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Sample Plan Amendments for IRC § 401(K) Plans, Continued

Sample Plan Amendment for EGTRRA § 646

The following amendment is optional.

SECTION ___. DISTRIBUTION UPON SEVERANCE FROM EMPLOYMENT

1. Effective date. If elected by the employer in the adoption agreement, this section shall apply for distributions and severances from employment occurring after the dates specified in the adoption agreement.

2. 2. New distributable event. A participant's elective deferrals, qualified nonelective contributions, qualified matching contributions, and earnings attributable to these contributions shall be distributed on account of the participant's severance from employment. However, such a distribution shall be subject to the other provisions of the plan regarding distributions, other than provisions that require a separation from service before such amounts may be distributed.

Adoption agreement provision

Section ___, Distribution Upon Severance from Employment, shall apply for distributions after:

(Enter a date no earlier than December 31, 2001.),

(Choose one.)

regardless of when the severance from employment occurred.

for severances from employment occurring after. (Enter date.)

Sample Plan Amendments for Defined Benefit Plans

Sample Plan Amendment for EGTRRA § 611(a)—415(b) limits-Non-Multiemployer Plans

The following sample amendment is optional for non-multiemployer plans that do not incorporate the § 415(b) limits by reference.

The last two sentences of section 3.2(b) of the amendment and the last sentence of section 3.2(c) may be modified to conform to Notice 87-21, 1987-1 C.B. 458, and Notice 83-10, 1983-1 C.B. 536. These notices provide alternatives with regard to the application of the mortality decrement in making the adjustments under section 3.2(b) and (c) of the amendment.

In addition to the following amendment, non-multiemployer plans should be amended as necessary to reflect EGTRRA § 654(b). Section 654(b) of EGTRRA changed the IRC § 415 aggregation rules to provide that, for limitation years beginning after December 31, 2001, a multiemployer plan is not combined or aggregated with a non-multiemployer plan for purposes of applying the § 415(b)(1)(B) compensation limit to the non-multiemployer plan.

If a plan's normal retirement age (NRA) is below 65, the plan's provisions regarding post-NRA accruals and actuarial increases for deferred benefits must be coordinated with the following amendment to ensure that the plan does not violate IRC § 401(a). In order to avoid such a violation, a plan may have to pay benefits at NRA, notwithstanding a participant's continued employment, or provide for the suspension of benefits in accordance with IRC § 411(a)(3)(B)).

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Sample Plan Amendments for Defined Benefit Plans, Continued

Sample Plan Amendment for EGTRRA § 611(a)—415(b) limits-Non-Multiemployer Plans (continued)

SECTION ___. LIMITATIONS ON BENEFITS

1. Effective date. This section shall be effective for limitation years ending after December 31, 2001.

2. Effect on participants. Benefit increases resulting from the increase in the limitations of IRC § 415(b) will be provided to those participants specified by the employer in the adoption agreement.

3. Definitions.

3.1 Defined benefit dollar limitation. The "defined benefit dollar limitation" is $ 160,000, as adjusted, effective January 1 of each year, under IRC § 415(d) in such manner as the Secretary shall prescribe, and payable in the form of a straight life annuity. A limitation as adjusted under IRC § 415(d) will apply to limitation years ending with or within the calendar year for which the adjustment applies.

3.2 Maximum permissible benefit: The "maximum permissible benefit" is the lesser of the defined benefit dollar limitation or the defined benefit compensation limitation (both adjusted where required, as provided in (a) and, if applicable, in (b) or (c) below).

a. If the participant has fewer than 10 years of participation in the plan, the defined benefit dollar limitation shall be multiplied by a fraction,

(i) the numerator of which is the number of years (or part thereof) of participation in the plan and

(ii) the denominator of which is 10.

In the case of a participant who has fewer than 10 years of service with the employer, the defined benefit compensation limitation shall be multiplied by a fraction,

(i) the numerator of which is the number of years (or part thereof) of service with the employer and

(ii) the denominator of which is 10.

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Sample Plan Amendments for Defined Benefit Plans, Continued

Sample Plan Amendment for EGTRRA § 611(a)—415(b) limits-Non-Multiemployer Plans (continued)

3.2(b) If the benefit of a participant begins prior to age 62, the defined benefit dollar limitation applicable to the participant at such earlier age is an annual benefit payable in the form of a straight life annuity beginning at the earlier age that is the actuarial equivalent of the defined benefit dollar limitation applicable to the participant at age 62 (adjusted under (a) above, if required). The defined benefit dollar limitation applicable at an age prior to age 62 is determined as the lesser of

i. the actuarial equivalent (at such age) of the defined benefit dollar limitation computed using the interest rate and mortality table (or other tabular factor) specified in section ___ of the plan and

ii. the actuarial equivalent (at such age) of the defined benefit dollar limitation computed using a 5 percent interest rate and the applicable mortality table as defined in section ___ of the plan.

Any decrease in the defined benefit dollar limitation determined in accordance with this paragraph (b) shall not reflect a mortality decrement if benefits are not forfeited upon the death of the participant. If any benefits are forfeited upon death, the full mortality decrement is taken into account.

3.2 (c) If the benefit of a participant begins after the participant attains age 65, the defined benefit dollar limitation applicable to the participant at the later age is the annual benefit payable in the form of a straight life annuity beginning at the later age that is actuarially equivalent to the defined benefit dollar limitation applicable to the participant at age 65 (adjusted under (a) above, if required).

The actuarial equivalent of the defined benefit dollar limitation applicable at an age after age 65 is determined as the lesser of:

(i) the actuarial equivalent (at such age) of the defined benefit dollar limitation computed using the interest rate and mortality table (or other tabular factor) specified in section ___ of the plan and

(ii) the actuarial equivalent (at such age) of the defined benefit dollar limitation computed using a 5 percent interest rate assumption and the applicable mortality table as defined in section ___ of the plan. For these purposes, mortality between age 65 and the age at which benefits commence shall be ignored.

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Sample Plan Amendments for Defined Benefit Plans, Continued

Sample Plan Amendment for EGTRRA § 611(a)—415(b) limits-Non-Multiemployer Plans Sample Plan Amendment for EGTRRA § 611(a)—415(b) limits-Non-Multiemployer Plans (continued)

Adoption agreement provision

Benefit Increases Resulting from the Increase in the Limitations of IRC § 415(b).

Benefit increases resulting from the increase in the limitations of IRC § 415(b) shall be provided to: (Choose one.)

- all current and former participants (with benefits limited by IRC § 415(b)) who have an accrued benefit under the plan immediately prior to the effective date of this section (other than an accrued benefit resulting from a benefit increase solely as a result of the increases in limitations under IRC § 415(b)).

- all employees participating in the plan who have one hour of service on or after the first day of the first limitation year ending after December 31, 2001.

Sample Plan Amendments for Defined Benefit plans -multi-employer plans

Sample Plan Amendment for EGTRRA §§ 611(a) and 654 - 415(b)- introduction

The following sample amendment is optional for multiemployer plans that do not incorporate the § 415(b) limits by reference.

The last two sentences of section 3.2(b) of the amendment and the last sentence of section 3.2(c) may be modified to conform to Notice 87-21, 1987-1 C.B. 458, and Notice 83-10, 1983-1 C.B. 536. These notices provide alternatives with regard to the application of the mortality decrement in making the adjustments under section 3.2(b) and (c) of the amendment.

Section 3.2(d) of the amendment should be deleted if the plan's limitation year is the calendar year.

EGTRRA § 654(b) changed the § 415 aggregation rules to provide that, for limitation years beginning after December 31, 2001, a multiemployer plan is not combined or aggregated with a non-multiemployer plan for purposes of applying the § 415(b)(1)(B) compensation limit to the non-multiemployer plan. This change is not reflected in this amendment for multiemployer plans. Plan sponsors should review their plans to determine if a plan amendment for EGTRRA § 654(b) should be adopted.

If a plan's normal retirement age (NRA) is below 65, the plan's provisions regarding post-NRA accruals and actuarial increases for deferred benefits must be coordinated with the following amendment to ensure that the plan does not violate IRC § 401(a). In order to avoid such a violation, a plan may have to pay benefits at NRA, notwithstanding a participant's continued employment, or provide for the suspension of benefits in accordance with IRC § 411(a)(3)(B).)

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Sample Plan Amendments for Defined Benefit plans -multi-employer plans Continued

Sample Plan Amendment for EGTRRA §§ 611(a) and 654 - 415(b)-

SECTION ___. LIMITATIONS ON BENEFITS

1. Effective date. This section shall be effective for limitation years ending after December 31, 2001, except as provided in section 3.2(d).

2. Effect on participants. Benefit increases resulting from the increase in the limitations of IRC § 415(b) will be provided to [enter one of the following 2 options: all current and former participants (with benefits limited by IRC § 415(b)) who have an accrued benefit under the plan immediately prior to the effective date (other than an accrued benefit resulting from a benefit increase solely as a result of the increases in limitations under IRC § 415(b)); all employees participating in the plan who have one hour of service on or after the first day of the first limitation year ending after December 31, 2001].

3. Definitions.

3.1 Defined benefit dollar limitation. The "defined benefit dollar limitation" is $ 160,000, as adjusted, effective January 1 of each year, under IRC § 415(d) in such manner as the Secretary shall prescribe, and payable in the form of a straight life annuity. A limitation as adjusted under IRC § 415(d) will apply to limitation years ending with or within the calendar year for which the adjustment applies.

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Sample Plan Amendments for Defined Benefit plans -multi-employer plans, Continued

Sample Plan Amendment for EGTRRA §§ 611(a) and 654 - 415(b)- (continued)

3.2 Maximum permissible benefit: The "maximum permissible benefit" is the defined benefit dollar limitation (adjusted where required, as provided in (a) and, if applicable, in (b) or (c) below, and limited, if applicable, as provided in (d) below).

(a) If the participant has fewer than 10 years of participation in the plan, the defined benefit dollar limitation shall be multiplied by a fraction,

i. the numerator of which is the number of years (or part thereof) of participation in the plan and

ii. the denominator of which is 10.

(b) If the benefit of a participant begins prior to age 62, the defined benefit dollar limitation applicable to the participant at such earlier age is an annual benefit payable in the form of a straight life annuity beginning at the earlier age that is the actuarial equivalent of the defined benefit dollar limitation applicable to the participant at age 62 (adjusted under (a) above, if required). The defined benefit dollar limitation applicable at an age prior to age 62 is determined as the lesser of

(i) the actuarial equivalent (at such age) of the defined benefit dollar limitation computed using the interest rate and mortality table (or other tabular factor) specified in section ___ of the plan and

(ii) (the actuarial equivalent (at such age) of the defined benefit dollar limitation computed using a 5 percent interest rate and the applicable mortality table as defined in section ___ of the plan. Any decrease in the defined benefit dollar limitation determined in accordance with this paragraph (b) shall not reflect a mortality decrement if benefits are not forfeited upon the death of the participant. If any benefits are forfeited upon death, the full mortality decrement is taken into account.

Sample Plan Amendments for Defined Benefit plans -multi-employer plans, Continued

Sample Plan Amendment for EGTRRA §§ 611(a) and 654 - 415(b)- (continued)

3.2 (c) If the benefit of a participant begins after the participant attains age 65, the defined benefit dollar limitation applicable to the participant at the later age is the annual benefit payable in the form of a straight life annuity beginning at the later age that is actuarially equivalent to the defined benefit dollar limitation applicable to the participant at age 65 (adjusted under (a) above, if required). The actuarial equivalent of the defined benefit dollar limitation applicable at an age after age 65 is determined as

(i) the lesser of the actuarial equivalent (at such age) of the defined benefit dollar limitation computed using the interest rate and mortality table (or other tabular factor) specified in section ___ of the plan and

(ii) the actuarial equivalent (at such age) of the defined benefit dollar limitation computed using a 5 percent interest rate assumption and the applicable mortality table as defined in section ___ of the plan. For these purposes, mortality between age 65 and the age at which benefits commence shall be ignored.

3.2 (d) Notwithstanding the above, for limitation years beginning before January 1, 2002, the maximum permissible benefit will not exceed the defined benefit compensation limitation. In the case of a participant who has fewer than 10 years of service with the employer, the defined benefit compensation limitation shall be multiplied by a fraction, (i) the numerator of which is the number of years (or part thereof) of service with the employer and (ii) the denominator of which is 10.

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Sample Plan amendments for Defined Benefit Plans

Sample Plan Amendment for EGTRRA § 611(c)-compensation

The following sample amendment is optional. It should be adopted if the plan sponsor wants to increase the limit on annual compensation taken into account under the plan in plan years beginning after December 31, 2001, to $200,000.

The last sentence of the first paragraph of the amendment and the related adoption agreement provision are applicable to plans that base benefit accruals in plan years beginning after December 31, 2001, on compensation for periods beginning before January 1, 2002. Also see Notice 2001-56 for guidance on the effective date of the change made by EGTRRA § 611(c).)

SECTION ___. INCREASE IN COMPENSATION LIMIT

1. Increase in limit. The annual compensation of each participant taken into account in determining benefit accruals in any plan year beginning after December 31, 2001, shall not exceed $ 200,000. Annual compensation means compensation during the plan year or such other consecutive 12-month period over which compensation is otherwise determined under the plan (the determination period). For purposes of determining benefit accruals in a plan year beginning after December 31, 2001, compensation for any prior determination period shall be limited as provided by the employer in the adoption agreement.

2. Cost-of-living adjustment. The $ 200,000 limit on annual compensation in paragraph 1 shall be adjusted for cost-of-living increases in accordance with IRC § 401(a)(17)(B). The cost-of-living adjustment in effect for a calendar year applies to annual compensation for the determination period that begins with or within such calendar year.

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Sample Plan amendments for Defined Benefit Plans, Continued

Sample Plan Amendment for EGTRRA § 611(c)-compensation-compensation (continued)

Adoption agreement provision)

Compensation Limit for Prior Determination Periods:

In determining benefit accruals in plan years beginning after December 31, 2001, the annual compensation limit in paragraph 1 of Section ___, Increase in Compensation Limit, for determination periods beginning before January 1, 2002, shall be: (Choose one.)

$ 200,000.

$ 150,000 for any determination period beginning in 1996 or earlier; $ 160,000 for any determination period beginning in 1997, 1998, or 1999; and $ 170,000 for any determination period beginning in 2000 or 2001.

Sample Plan Amendment for EGTRRA § 613-top heavy

The following sample amendment applies to all plans that are required to include provisions to determine whether the plan is top-heavy and that apply if the plan is top-heavy. The amendment is required.

The amendment may be modified in accordance with IRC § 416(f) and the regulations there under to provide that the minimum benefit requirement shall be satisfied by benefits or contributions, including employer matching contributions, under another plan, including another plan that consists solely of a cash or deferred arrangement which meets the requirements of IRC § 401(k)(12) and matching contributions with respect to which the requirements of IRC § 401(m)(11) are met. See section 3 and the adoption agreement provision for the sample plan amendment for EGTRRA § 613 for defined contribution plans.)

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Sample Plan amendments for Defined Benefit Plans, Continued

Sample Plan Amendment for EGTRRA § 613-top heavy (continued)

SECTION ___. MODIFICATION OF TOP-HEAVY RULES

1. Effective date. This section shall apply for purposes of determining whether the plan is a top-heavy plan under IRC § 416(g) for plan years beginning after December 31, 2001, and whether the plan satisfies the minimum benefits requirements of IRC § 416(c) for such years. This section amends section ___ of the plan [enter the section of the plan that includes top-heavy provisions].

2. **Determination of top-heavy status**.

2.1 **Key employee**. Key employee means any employee or former employee (including any deceased employee) who at any time during the plan year that includes the determination date was an officer of the employer having annual compensation greater than $ 130,000 (as adjusted under IRC § 416(i)(1) for plan years beginning after December 31, 2002), a 5-percent owner of the employer, or a 1-percent owner of the employer having annual compensation of more than $ 150,000. For this purpose, annual compensation means compensation within the meaning of IRC § 415(c)(3). The determination of who is a key employee will be made in accordance with IRC § 416(i)(1) and the applicable regulations and other guidance of general applicability issued there under.

2.2 **Determination of present values and amounts.** This section 2.2 shall apply for purposes of determining the present values of accrued benefits and the amounts of account balances of employees as of the determination date.

2.2.1 **Distributions during year ending on the determination date.** The present values of accrued benefits and the amounts of account balances of an employee as of the determination date shall be increased by the distributions made with respect to the employee under the plan and any plan aggregated with the plan under IRC § 416(g)(2) during the 1-year period ending on the determination date. The preceding sentence shall also apply to distributions under a terminated plan which, had it not been terminated, would have been aggregated with the plan under IRC § 416(g)(2)(A)(i). In the case of a distribution made for a reason other than separation from service, death, or disability, this provision shall be applied by substituting "5-year period" for "1-year period."

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Sample Plan amendments for Defined Benefit Plans, Continued

Sample Plan Amendment for EGTRRA § 613-top heavy (continued)

2.2.2 Employees not performing services during year ending on the determination date. The accrued benefits and accounts of any individual who has not performed services for the employer during the 1-year period ending on the determination date shall not be taken into account.

3. Minimum benefits. For purposes of satisfying the minimum benefit requirements of IRC § 416(c)(1) and the plan, in determining years of service with the employer, any service with the employer shall be disregarded to the extent that such service occurs during a plan year when the plan benefits (within the meaning of IRC § 410(b)) no key employee or former key employee.

Sample Plan Amendment for EGTRRA§§ 641, 642 and 643

The following sample amendment is required. However, the third paragraph should be deleted in the case of plans that do not have after-tax employee contributions.

SECTION ___. DIRECT ROLLOVERS OF PLAN DISTRIBUTIONS

1. Effective date. This section shall apply to distributions made after December 31, 2001.

2. 2. Modification of definition of eligible retirement plan. For purposes of the direct rollover provisions in section ___ of the plan, an eligible retirement plan shall also mean an annuity contract described in IRC § 403(b) and an eligible plan under IRC § 457(b) which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this plan. The definition of eligible retirement plan shall also apply in the case of a distribution to a surviving spouse, or to a spouse or former spouse who is the alternate payee under a qualified domestic relation order, as defined in IRC § 414(p).

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Sample Plan amendments for Defined Benefit Plans, Continued

Sample Plan Amendment for EGTRRA§§ 641, 642 and 643 (continued)

3. Modification of definition of eligible rollover distribution to include after-tax employee contributions. For purposes of the direct rollover provisions in section ___ of the plan, a portion of a distribution shall not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions which are not includible in gross income. However, such portion may be paid only to an individual retirement account or annuity described in IRC §§ 408(a) or (b), or to a qualified defined contribution plan described in IRC §§ 401(a) or 403(a) that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible.

Sample Plan Amendment to Specify Additional Types of Rollovers Accepted by the Plan Pursuant to EGTRRA §§ 641, 642 and 643

A plan is not required to accept rollover contributions, including direct rollovers under IRC § 401(a)(31). The following optional sample amendment may be used to specify additional types of rollovers the plan will accept pursuant to EGTRRA §§ 641, 642 and 643. A defined benefit plan that accepts rollovers must separately account for such amounts.

SECTION ___. ROLLOVERS FROM OTHER PLANS

If provided by the employer in the adoption agreement, the plan will accept participant rollover contributions and/or direct rollovers of distributions made after December 31, 2001, from the types of plans specified in the adoption agreement, beginning on the effective date specified in the adoption agreement.

Adoption agreement provisions-Direct Rollovers:

The plan will accept a direct rollover of an eligible rollover distribution from: (Check each that applies or none.)

- a qualified plan described in IRC §§ 401(a) or 403(a).
- an annuity contract described in IRC § 403(b).
- an eligible plan under IRC § 457(b) which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

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Sample Plan amendments for Defined Benefit Plans, Continued

Sample Plan Amendment to Specify Additional Types of Rollovers Accepted by the Plan Pursuant to EGTRRA §§ 641, 642 and 643 (continued)

Participant Rollover Contributions from Other Plans:

The plan will accept a participant contribution of an eligible rollover distribution from: (Check each that applies or none.)

- a qualified plan described in IRC §§ 401(a) or 403(a).
- an annuity contract described in IRC § 403(b).
- an eligible plan under IRC § 457(b) which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

Participant Rollover Contributions from IRAs:

The plan: (Choose one.)

Will

will not

accept a participant rollover contribution of the portion of a distribution from an individual retirement account or annuity described in IRC §§ 408(a) or 408(b) that is eligible to be rolled over and would otherwise be includible in gross income.

Effective Date of Direct Rollover and Participant Rollover Contribution Provisions:

Section ___, Rollovers From Other Plans, shall be effective:

(Enter a date no earlier than January 1, 2002.)

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